No. 22346

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY S. STONEHILL and ROBERT P. BROOKS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Central District of California.

APPELLANTS' OPENING BRIEF.

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vs.

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Appeal From the United States District Court for the Central District of California.

APPELLANTS' OPENING BRIEF.

I.

STATEMENT OF JURISDICTION.

This is an appeal pursuant to Section 1292(b) of Title 28, U.S.C., from an interlocutory Order of the United States District Court for the Central District of California, Honorable Harry C. Westover, District Judge, denying appellants' motion to suppress evidence illegally obtained in a civil action brought by the United States of America. The complaint below was filed in January of 1965 against taxpayer appellants Harry S. Stonehill and Robert P. Brooks for the purpose of foreclosing tax liens against property owned by taxpayer appellants (and others claiming an interest in said property). The liens are based on a jeopardy assessment made by the Commissioner of Internal Revenue,

relating to taxable years 1958-1961, during which years both appellants were long-time legal residents of the Philippines. By their answer, appellants put in issue the alleged liability for taxes and a fraud penalty, underlying the assessments.

The District Court's jurisdiction rests on Sections 1340 (original jurisdiction of civil actions arising from internal revenue acts) and 1345 (original jurisdiction over actions commenced by the United States) of Title 28 of the United States Code, and on Sections 7401, 7402 (authorization to commence, and jurisdiction over civil actions under the internal revenue laws), and 7403 (actions to enforce liens) of the Internal Revenue Code of 1954.

Appellants, on March 10, 1967, moved for an order suppressing evidence illegally secured [Clerk's Transcript 2].[1] The evidence sought to be suppressed consists of in excess of thirty thousand documents, obtained by the United States as a result of raids, searches and seizures conducted on March 3, 4, and 5, 1962, against the residences and offices of appellants in Manila, Republic of the Philippines [CT 2]. These thirty thousand documents were culled by Internal Revenue agents from several truckloads of documents physically seized in over thirty different locations by over two hundred agents of the Philippine National Bureau of Investigation. These searches and seizures have been held illegal and unconstitutional by the Philippine Supreme Court and the court below (274 F. Supp. at 424) [CT 56, lines 19-22]. They were instigated, planned, directed and physically participated in by United States federal agents.

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[1]Clerk's Transcript will hereinafter be referred to as CT. Reference to Reporter's Transcript of the trial proceedings will hereinafter be made as RT.

The trial court ordered a hearing on this motion, which began on June 12, 1967, and concluded on June 23, 1967. By written Order and Opinion filed October 16, 1967, the District Court denied the motion to suppress [CT 43-57], and on October 20, 1967, granted a certificate pursuant to Title 28 USCA 1292(b) to the effect that its Order involved a controlling question of law as to which there is a substantial difference of opinion, and that an immediate appeal thereupon might materially advance the litigation [CT 58]. Petition for leave to appeal under Section 1292(b) was duly and timely filed by petitioners and granted by this Court on November 9, 1967 [CT 60].

The controlling question of law before this Court is basically whether the District Court erred in denying appellants' motion to suppress.

II.
STATEMENT OF THE CASE.

A. Statement of Facts.

Armed with forty-two search warrants subsequently found illegal by the Supreme Court of the Philippines, two hundred agents of the Philippine National Bureau of Investigation swooped down, beginning Saturday afternoon, March 3, 1962, in simultaneous raids upon thirty-two locations where appellants, both United States citizens, were believed to have financial records and documents. They seized hundreds of thousands of documents which were hauled away by the truckloads. Other items not named in the warrants, such as cash and equipment, were also seized and removed. The searches continued at some locations until three or four the following morning. The raids were marked by brandishing and pointing of firearms at employees

of appellants, prohibiting their ingress and egress from industrial and office premises, tearing out of a wall safe, the carrying away of appellant Stonehill's safe, breaking down a door, and dumping records and papers in the middle of the floor [RT 607, 636, 650, 674, 744, 748; Exs. M-Z, AA-AL].

United States Internal Revenue Agents instigated, planned, directed and physically participated in these unreasonable searches and seizures. Thereafter, these United States IRS agents culled and copied over thirty thousand documents from the hundreds of thousands of documents seized, upon which they based the jeopardy assessments which are in issue in this case.

Appellant Harry S. Stonehill, a native born American citizen and World War II G.I., was honorably discharged as a lieutenant after the war. He chose to stay in Manila, Philippine Islands, after his discharge and there met appellant Robert P. Brooks, an American citizen, born of an American father in the Philippines, who had never been in the continental United States. Brooks joined Stonehill in business shortly thereafter [CT 8].

Appellant Stonehill built a substantial number of business establishments in the Philippines, including a cigarette manufacturing company known as United States Tobacco Co. By March 3 of 1962, both Stonehill and Brooks were prominent and respected residents of Manila, active in civic, social and political affairs, after a steady rise to success during the sixteen years preceding the events of March 3, which gave rise to this litigation [CT 7, 8].

Neither Stonehill nor Brooks had been—at any time during the sixteen years preceding March 3, 1962—the subject of any investigation directed against them,

let alone of any arrest or prosecution, American or Philippine [RT 75-79].

Stonehill's superficial acquaintance with a fellow American against whom a tax investigation was pending in late 1960 caused the Internal Revenue Office of International Operations in Washington to ask Robert Chandler, the United States Internal Revenue Representative for the entire Far East (stationed in Manila), to have his staff audit Stonehill's 1958 United States tax return [RT 75-79, 81-82; Pl. Ex. 11]. IRS representative Chandler declined to undertake the investigation for lack of staff and nothing further was done [Def. Ex. A; RT 86].

In December of 1961, a disgruntled employee of U.S. Tobacco Co., Menhart Spielman, decided to be an informer against appellants. He surreptitiously conferred with a series of United States agents and officials in the Philippines, including the CIA representative, the United States Consul General, FBI agent Hawley, and finally IRS agent Chandler [RT 97-99, 107-112, 735, Ex. 11].

On the basis of Spielman's uncorroborated story and some one hundred documents which he represented to the United States officials that he had stolen from appellants' files, the United States agents determined that they might be able to work up a United States tax case against appellants, and so reported to Washington [RT 112-113, 122; Ex. 11]. For the next three weeks, FBI agent Hawley and IRS agent Chandler conducted intensive interrogations of the informer, Spielman, at Chandler's office or the informer's home [RT 112-113, 122, 126].

Apparently the unprecedented success of appellants in the Philippines had created a climate of gossip and suspicion which had permeated the United States Em-

bassy in Manila. On January 9, 1962, an extraordinary session of the top officials of the United States Embassy was held, and the highest official in residence, Minister Mein, made two policy decisions: (1) to attempt to permanently get Stonehill out of the Philippines; and (2) to attempt to develop a United States tax case against Stonehill in order to publicly improve the enforcement image of the Internal Revenue Service in the Far East [Ex. E].

On December 22, 1962, IRS agent Chandler officially requested Washington to send him a special agent and a revenue agent to work on the proposed tax investigations of the appellants [RT 129]. On January 10, 1962, Chandler repeated this request to Washington for U.S. agents to be sent to the Philippines to assist him in investigating the appellants [Ex. E].

Having no effective subpoena power in the Philippines, and having received only about a hundred papers of doubtful evidentiary value, the United States contingent in Manila could not implement the January 9, 1962, decision to get and keep Stonehill out of the Philippines and to make a widely publicized tax case against him, without using Philippine law enforcement agencies.

The U.S. agents in developing their strategy had to reconcile several factors. The agents had spent weeks interrogating the informer, from whom they extracted everything he had to offer, but they still felt that the information they had obtained from him (stolen documents) "was not very good evidence." [RT 1093]. They needed additional agents to work the case, and they needed the assistance of the Philippine government [Ex. E]. However, the informer, according to Chandler, "was afraid of his life at the time [and] he wouldn't go near a Philippine government office at

that time." [RT 141]. Finally, FBI agent Hawley and IRS agent Chandler persuaded Spielman to meet with Philippine law enforcement officials [RT 141].

On January 27, 1962, a Saturday, a three-hour secret meeting was held at the United States Embassy where FBI agent Hawley and IRS agent Chandler introduced their informer, Spielman, to Colonel Lukban, the Director of the Philippine National Bureau of Investigation (hereinafter NBI) and his assistant, Mr. Nocon [RT 139-142]. Spielman told his story, and Colonel Lukban promised that "he would inquire into it and that if Mr. Spielman's story was found to be correct, he would investigate it." [RT 143]. Obviously, prior to this secret meeting, appellants were of no official concern to the Philippine government. In fact, a new Philippine administration had been inaugurated in January of 1962. The new Secretary of Justice, Jose Diokno, had just taken office [RT 151].

On February 1, 1962, another secret meeting was held in a private club in order to induce the new Secretary, Diokno, to go along with the U.S. Agents. Besides Diokno, FBI agent Hawley and IRS agent Chandler attended [RT 153]. Chandler advised the group that he thought he could make a substantial U.S. tax case against appellants but that he did not have enough evidence to proceed [RT 158-159]. Secretary Diokno expressed interest and asked that arrangements be made for him to personally discuss the matter with U.S. Attorney General Kennedy who was then traveling in the Far East [RT 161-162]. Diokno felt "that if he was going to stick his neck out . . . and go into this, he thought probably the United States should also go aggressively into it and he evidently would have more confidence if the U.S. was working on it from whatever U.S. violations there might be . . ." [RT 161].

On February 4, 1962, Secretary Diokno met Spielman, the informer, and heard his story. On February 5, 1962, Diokno discussed the matter with the then President Macapagal of the Philippines [RT 838; Ex. 12, pp. 15-16].

IRS agent Chandler met twice with Secretary Diokno and telephoned Hong Kong in an effort to arrange a meeting with Kennedy [RT 205, 984]. Prior to his trip to Hong Kong, which was from February 10, 1962, to February 13, 1962, Secretary Diokno left instructions that no action should be taken until his return from Hong Kong [RT 164]. His personal aide, Del Rosario, testified: "Well, it took time before the Secretary of Justice decided to enter this." [RT 835]. "Well, he [Dikono] told me in the beginning, after I was briefed in this case, he could not decide whether he was going to get into this case all the way or not." [RT 836]. "He was planning to go to Hong Kong, and we were not to take any action until he returned from Hong Kong." [RT 840]. "Well, before this trip we were not supposed to take any action on the Stonehill case until after he returned, because whatever action was dependent on the outcome of his trip to Hong Kong." [RT 841]. The Diokno aide further testified that when Diokno returned from Hong Kong, he was instructed to proceed with the Stonehill and Brooks matter [RT 842]. IRS agent Chandler testified that he received word that the "raids had been discussed in Hong Kong by Diokno with a member of Kennedy's staff." [RT 167]. Diokno agreed to proceed with the raids albeit not "through ordinary Philippine government channels." [Ex. AZ]. Diokno's aide testified that: "Well, we had some sort of an agreement that we were going to get a backing from the United States in the event that something like this would happen." [RT 880].

Between February 1, 1962, and February 12, 1962, while Diokno was trying to work out his agreement with the United States, there were daily meetings at the home of IRS agent Chandler between the U.S. agents and the Philippine agents. These meetings were held for the sole purpose of planning and preparing for the upcoming three days of searches and seizures [RT 149, 278-280].

Once Diokno met the United States Attorney General's Executive Assistant in Hong Kong and had reached an agreement with the United States relative to their support and participation, the United States Consul General in Hong Kong on February 12, 1962, sent a cable to the United States Department of State with copies to Department of Justice and to the IRS outlining the agreement and that Diokno would conduct raids in the end of February of 1962 [Ex. AZ].

Now the preparations and planning for the raids continued with Diokno's concurrence. Numerous meetings were held in Chandler's home with the Director of NBI and his agents [RT 273]. At these meetings IRS agent Chandler advised the NBI personnel of the various types of financial records and documents which the United States Internal Revenue Service would be interested in securing. The informer attended some of these meetings and advised the agents about locations to search and what might be found at the various locations [RT 316, 991]. Chandler testified that: "We emphasized that our emphasis was in financial matters and records." [RT 316].

Throughout the preparations for the raids, Chandler stressed to the Philippine officials that he needed vouchers, accounting sheets and books of account to make an American "net worth" tax case against Stone-

hill and Brooks [RT 847, 848]. Major Del Rosario, the "right arm" of the Philippine Secretary of Justice, testified that the Philippine Department of Justice entered the case solely for the purpose of "helping the U.S. agents in developing their tax case" [RT 836], and that the Philippine Government was not interested in making any tax case at all [RT 848].

U.S. agents were dispatched to Manila from Washington immediately after receipt of the cable reporting the United States-Diokno agreements of February 12, 1962. The raids were originally scheduled for February 24, 1962, but they were postponed until March 3, 1962, for the sole reason that the agents who were coming from the United States to help agent Chandler had not arrived [RT 843, 844].

During the preparations for the raids, Secretary Diokno personally came to Chandler's home to discuss the seizure of appellants' records [RT 197-199]; and Chandler's home became the headquarters for the entire raid planning, as the NBI, which was wire-tapping appellants' telephones, brought current recordings of wire-tapped conversations to Chandler's home, where they were played and listened to by Chandler and the NBI agents [RT 149-150].

Prior to the raids, Chandler gave NBI agents detailed written instructions as to what to do and what to seize [Exs. I, J]. Chandler admitted in his testimony that all of Exhibit I was in his handwriting, and that most of Exhibit J was in his handwriting [RT 341, 862, 866-867]. Exhibit I, in part, directs the NBI agents with reference to certain locations to "Confiscate records in separate small adjoining buildings—this is building from which John Brooks carried stamps at night;" and "To be taken apart in detail—possible

stamp hideout." Exhibit J is a sketch of floorplans of two of the buildings to be searched with specific locations identified as possible sources of documents.

On February 26, 1962, IRS Revenue Agent William Ragland arrived in Manila to assist Chandler in the investigations of appellants [RT 990]. Chandler instructed Ragland to familiarize himself with the case and to obtain photographic equipment to be used to copy documents seized in the raids [RT 271-272]. By this time, Chandler had already worked out an agreement with Colonel Lukban whereby all of the documents seized in the raids would be made available to the U.S. IRS agents for inspection and copying [RT 271, 923].

On March 2, 1962, the night before the raids, there was a briefing session for the NBI team leaders who would lead the two hundred NBI agents on the raids. The session was held in Colonel Lukban's home. Agent Chandler was invited and attended this final briefing session [RT 300-304]. Chandler made two vital contributions at this meeting: he reviewed and approved the contents of the search warrants which were being typed then and there; and he selected the room at the Army-Navy Club as an additional location to be searched. This room at the Army-Navy Club was not even in either of appellants' name, and was not on the list of locations that were to be searched. Thus, but for Chandler's direction this location would never have been searched [RT 305, 306, 308, 311-316, 346, 1008-1011]. Even the trial court, when it was apprised of this evidence, stated on the record that this selection of the room in the Army-Navy Club by IRS agent Chandler is "at least one example of a participation" [RT 1196].

On Saturday morning, March 3, 1962, with elaborate secrecy, the NBI was able to get forty-two search

warrants signed by local judges and the two hundred NBI agents were ready to commence their raids [Ex. 12, pp. 144-145; Exs. M-Z, AA-AL]. However, prior to commencing the raids, it was the strategy to place both appellants under arrest and hold them without bail. In order to accomplish this, Secretary Diokno, on the day of the raids, arranged to have appellants arrested on non-bailable deportation charges [RT 197-199]. Chandler was aware of this stratagem before the raids [RT 199]. The arrests of appellants on these charges was the first official act of deportation by the Philippine government. Major Del Rosario, Diokno's right arm, testified that the Under Secretary of Justice was the Chairman of the Deportation Board and had been alerted on March 2, 1962, to meet Diokno and Del Rosario at 8:00 A.M. on March 3, 1962. The meeting took place, and for the first time deportation charges were signed by Diokno's Under Secretary [RT 852-853]. None of the forty-two search warrants in any manner deal with deportation charges [Exs. M-Z, AA-AL].

At approximately 1:00 P.M. on March 3, 1962, the appellants were arrested and the raids commenced [RT 397-399]. The IRS agents, Chandler and Ragland, plus IRS agent Reynolds, who was stationed in Manila, were also working that Saturday. Armed with pencils, paper and copying equipment, the U.S. IRS agents stationed themselves at the Arson Squad Building of the NBI in accordance with prior arrangements with Director Lukban [RT 280-282, 387].

The U.S. IRS agents did not remain at their station. On more than one occasion while the raids were in progress, they left and personally participated in the searches and assisted in the selection of documents to be seized. Agent Chandler went to the apartment of the

United States Colonel in charge of OSI from where he was able to observe the progress of the search at one of the selected locations [RT 393-394].

While the searches and seizures were still in progress, agent Chandler telephoned Colonel Lukban several times, and at about 10:00 P.M., in response to Colonel Lukban's telephone call, the IRS agents went to the Colonel's office. At this time, some seized items were shown to the IRS agents, and they requested permission to start photocopying but were told to wait until the documents were logged [RT 1017-1019]. An NBI agent came into the office, spoke to Colonel Lukban, who in turn told Chandler and the two IRS agents that the NBI agent "had run into a big area of records and he didn't know what—he was not qualified to determine what he should take and what he shouldn't take." [RT 1019-1020]. According to Chandler's testimony, Colonel Lukban asked Chandler and the two agents "if myself and the men would go down there and look at the records and see what should be taken and what should be left behind." [RT 1020]. The U.S. agents then went to a warehouse of the U.S. Tobacco Co., which was still being searched by the NBI agents, and according to Chandler's testimony, he and the two agents: "went through the records and segregated what we thought might be important, and left them I think in the box there, put them in a box." [RT 1020]. Chandler continued: "We looked for general ledgers, the important records books" [RT 121]; and they selected what they thought were significant from an accounting point of view [RT 1022].

Chandler's testimony about his participation in the search was corroborated by Miss Zubiri, an employee of the telephone company in Los Angeles at the time of the hearing who in 1962 was an employee of

U.S. Tobacco Co. She testified that she was at work on Saturday, March 3, 1962, in the warehouse when, at about 3:00 P.M., numerous NBI agents swarmed in with drawn guns and started to search the premises [RT 636-637]. She was kept in the warehouse until 3:00 A.M. the next morning while the search was on [RT 643]. At around 10:30 P.M. she saw agent Chandler enter the premises and she asked him if he was an FBI man. She said he responded: "Don't say that, little girl, don't say that word, little girl." [RT 646]. She also saw IRS agent Ragland in the premises while the search was in progress [RT 648]. She saw the U.S. agents go through the warehouse looking at things while the NBI agents "kept on searching the place." [RT 650].

The U.S. agents then left the warehouse and went to the main office of the U.S. Tobacco Co. where the NBI agents were still searching [RT 413, 414, 1024, 1025]. Agent Chandler testified that he entered the building and asked the NBI agent in charge if he had found certain records stored behind the main office; and when the NBI agent seemed unfamiliar with the location, Chandler went up into the building and physically pointed out the area to be searched [RT 415, 1025].

Chandler's testimony about his activities at the main office were also corroborated by the testimony of Mr. Geronimo Taal, the paymaster of U.S. Tobacco Co. [RT. 596]. Mr. Taal testified that he was present on March 3, 1962, when the NBI agents arrived at about 3:00 P.M. and commenced their search [RT 598] which lasted until 4:00 A.M. [RT 608]. Between 8:00 P.M. and midnight, Mr. Taal saw agent Chandler on the premises while the raid was in progress and in the company of NBI agents [RT 600-605]. He testified

that he saw the NBI agents smash open a door, and the U.S. agent enter the record room with the NBI agents [RT 605].

On Sunday night, March 4, 1962, an apparent victory party was held at the home of FBI agent Hawley. Among those present were: Colonel Lukban, Secretary Diokno, Danny Nocon, Major Del Rosario and IRS agent Chandler. During the festivities, agent Chandler remarked that he was right in telling them to raid the Army-Navy Club [RT 426-427].

At 8:30 A.M. on Monday, March 5, 1962, U.S. IRS agents Ragland and Reynolds established themselves at NBI headquarters and began the monumental task of inspecting hundreds of thousands of seized documents from which they culled some thirty thousand documents, which provide the sole basis for the institution of this case [RT 1037, 1153].

Nearly three years after these raids, in January of 1965, jeopardy assessments were served upon appellants, and soon thereafter this case was instituted.

On June 19, 1967, the Supreme Court of the Philippines, in a unanimous opinion, held that the searches and seizures of March 3, 1962, were illegal and violated the Philippine constitutional guarantee against unreasonable search and seizure (which is identical to the Fourth Amendment to the United States Constitution [Ex. AW, 20 Phil. Sup. Ct. Rpts. Ann. 383 (1967)].

In view of this decision by the Philippine Supreme Court and Judge Westover's Memorandum Opinion below, in which he holds that the searches and seizures of March 3, 1962, were illegal under United States Constitutional standards (274 F. Supp. 420, 424), the above statement of facts has not stressed the facts of illegality of the searches and seizures but rather the facts relating to the United States involvement in the searches and seizures.

B. Statement of Legal Issues.

1. Does the Fourth Amendment to the United States Constitution exclude from use in federal courts evidence against United States citizens that was obtained in a foreign country by a series of searches and seizures that violated the constitutional guarantees of the foreign country and would have violated the constitutional guarantees of the United States had they been conducted in the United States?

2. Were the illegal searches and seizures in this case in substance illegal searches and seizures by the United States government because of the involvment of the United States agents?

III.
SPECIFICATION OF ERRORS.

A. The trial court erred in denying appellanats' motion to suppress evidence as illegally seized.

B. The trial court erred in its finding of ultimate fact and conclusion of law that the U.S. federal agents "did not participate in, were not present at, or a party to the raid conducted by the Philippine National Bureau of Investigation."

1. The trial court erred in concluding that the intermediate facts it did find did not constitute federal "participation" in the illegal searches and seizures.

2. The trial court erred in not finding on the evidence adduced that the U.S. federal agents: instigated, engineered, directed and planned the illegal searches and seizures; and that the U.S. federal agents were present at and during the illegal searches and seizures; and the U.S. federal agents assisted in selecting and securing evidence that was seized during the illegal searches.

IV.
SUMMARY OF ARGUMENT.

A. (1) The motion to suppress should have been granted by the District Court. The searches and seizures producing the evidence sought to be suppressed were held by the Supreme Court of the Philippines to have been illegal and unconstitutional under Article III (Sec. 1, par. 3) of the Philippine Constitution (identical to the Fourth Amendment of the U.S. Constitution) and the Philippine Rules of Court (equivalent to the U.S. Federal Rules of Civil and Criminal Procedure). (2) The searches and seizures were illegal by U.S. Constitutional standards. The court below so held. Evidence obtained through the illegal searches and seizures of March 3, 1962 cannot be used in any proceedings in a U.S. Federal Court, including the instant tax and penalty enforcement proceedings.

B. The historic development of the Fourth Amendment to the U.S. Constitution has been an evolutionary process so that today it contains not only a declaration of a right but an implicit remedy for a violation of the right. It must be read as guaranteeing the people to be secure from unreasonable searches and seizures and excluding from evidence any material obtained as a result of an unreasonable search and seizure, regardless of who did the searching and seizing.

C. United States agents obtained evidence in the Philippines through illegal searches for the purpose of enforcing the Federal tax liability of appellants, who are American citizens and were legal residents of the Philippines. American citizens who—while residing

abroad—are liable for the payment of Federal taxes under the Sixteenth Amendment of the United States Constitution. Also, they enjoy—while residing abroad —the protection of the Fourth and Fifth Amendments to the Constitution when the American Government exercises jurisdiction over them. The Constitution follows the Flag.

D. (1) The intermediate findings of fact set out in the opinion of the District Court constitute sufficient Federal involvement to make the illegal searches in substance searches by Federal agents. (2) *Brulay v. U.S.*, 383 F. 2d 345 (CA 9, 1967) is clearly distinguishable on the facts from those found by the District Court in *U.S. v. Stonehill.* The only claim to U.S. involvement in *Brulay* rests on a telephone call by a U.S. narcotics agent to Mexican *federal* police prior to the arrest and seizures, which seizures were conducted by Tijuana *municipal* police. No causal connection between the U.S. "alert" of the Mexican federal agents and the arrest and seizures by the Mexican municipal police was shown. There is no intimation that the *Brulay* arrest was unlawful under Mexican constitutional standards.

E. There was uncontradicted evidence before the District Court, disregarded or misinterpreted in the trial court's opinion, which requires a finding of ultimate fact and a conclusion of law that there was U.S. instigation and participation and that the illegal searches of March 3, 1962, were in substance searches by federal agents. The evidence shows:

> (a) There was no pending Philippine investigation (or interest in any investigation) of the appellants prior to February or March of 1962.

(b) U.S. officials induced Philippine officials beginning on January 27, to begin an investigation.

(c) The Philippine Secretary of Justice insisted on, and obtained, a special meeting with a top U.S. Department of Justice official in Hong Kong before assisting the U.S. by authorizing the raids "outside of ordinary Philippine government channels."

(d) U.S. and Philippine officials together, in the private home of the chief U.S. tax enforcement agent, planned and prepared for the illegal seizures.

(e) U.S. officials actively assisted in the preparation for the raids by written instructions for searches and seizures and selection of a key location. They were physically present in at least two locations and physically selected accounting records important to their tax case and directed that the same be seized. These and other actions by the U.S. Revenue and FBI agents, as detailed in the argument, *infra,* clearly constitute "instigation" of the illegal searches which on the facts makes this Court's decision in *Brulay* inapplicable. They constitute "participation" within the purview of *Byars v. U.S.,* 273 U.S. 28, 47 S.Ct. 248; *Lustig v. U.S.,* 338 U.S. 74, 69 S.Ct. 1372, and this Court's *en banc* decision in *Corngold v. U.S.,* 367 F. 2d 1 (1966). To hold otherwise would be equivalent to acquitting a criminal of complicity who hires a gunman and works out detailed plans for a murder because he did not personally pull the trigger. The evidence in this case shocks the conscience and non-suppression would be an invitation to Federal offcers to violate the constitutional rights of American citizens by subterfuge.

V.
ARGUMENT.

A. THE DISTRICT COURT ERRED IN DENYING THE MOTION TO SUPPRESS.

(1) The Searches and Seizures Were Illegal Under Philippine and U.S. Constitutional Standards.

This case was brought by the United States to foreclose liens and to reduce assessments of tax deficiencies and fraud penalties to judgment. Both the deficiencies and the penalties are substantial and in issue.

When the District Court was apprised of the fact that the evidence underlying the assessments was obtained through illegal searches and seizures (claimed by appellants to have been instigated and participated in by United States agents) the Court severed the issue of suppression or inadmissibility of such evidence and set it down for trial in advance of the trial on the merits [CT 2].

While the issue of suppression was being tried, the Supreme Court of the Philippines, in *Stonehill, et al. v. Diokno, et al,* 20 Phil. Sup. Ct. Rptrs. Ann. 383 (1967) [Ex. AW], unanimously held that the very searches and seizures involved here were, indeed, illegal and in violation of Section 1, Paragraph 3 of Article III of the Philippine Constitution. This Section reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized."

The Philippine Supreme Court based its holding on the illegality of the search warrants, with regard to which it said:

> "Two points must be stressed in connection with this constitutional mandate, namely: (1) that no warrant shall issue but upon *probable cause,* to be determined by the judge in the manner set forth in said provision; and (2) that the warrant shall *particularly* describe the things to be seized.
>
> "None of these requirements has been complied with in the contested warrants. Indeed, the same were issued upon applications stating that the natural and juridical persons therein named had committed a 'violation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and Revised Penal Code.' In other words, no *specific* offense had been alleged in said applications. The averments thereof with respect to the offense committed were *abstract.* As a consequence, it was *impossible* for the judges who issued the warrants to have found the existence of probable cause, for the same presupposes the introduction of competent proof that the party against whom it is sought has performed *particular* acts, or committed *specific* omissions, violating a given provision of our criminal laws. As a matter of fact, the applications involved in this case do not allege any specific acts performed by herein petitioners. It would be a legal heresy, of the highest order, to convict anybody of a 'violation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and Revised Penal Code,'—as alleged in the aforementioned applications—without reference to any determinate provision of said laws or codes." (pp. 6, 7 of Opinion [Ex. AW], quoted in the District Court's Opinion, 274 F. Supp. at p. 424).

The Philippine constitutional provision—held violated by the Philippine Supreme Court—is almost identical in language with the Fourth Amendment to the United States Constitution. It was adopted by the Philippines in conscious duplication of the Fourth Amendment [Ex. AT] (*Cf.* Testimony of Dean Jose Aruego, delegate to the Philippine Constitutional Convention, a graduate of the University of Manila, and holding the degree of Doctor of Jurisdictional Science from George Washington University of Washington, D.C. [RT 762]).

The Supreme Court of the Philippines is the highest court of that country [RT 761] and procedure in the Philippines is governed by Rules of Court promulgated by the Supreme Court which are substantially equivalent to the Rules of Federal Civil and Criminal Procedures of the United States [RT 762].

In holding the searches illegal under the Philippine Constitution and Rules of Court, the Philippine Supreme Court relied to a great extent on American precedent and U.S. Supreme Court cases interpreting the Fourth Amendment [RT 783-784]. It cited *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359 (1949); *Elkins v. U.S.*, 364 U.S. 206, 80 S. Ct. 1437 (1960); and *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684 (1961) [Ex. AW, p. 10, ftn. 20].

In view of (1) the identity in language of Section 1, paragraph 3 of Article III of the Philippine Constitution with the Fourth Amendment to the United States Constitution; (2) the substantial identity of Philippine procedural rules with U.S. Federal procedural rules, and (3) the reliance by the Philippine Supreme Court on U.S. Supreme Court decisions on the Fourth Amendment, illegality of the searches under U.S. constitutional standards appears self-evident.

In addition, the District Court independently came to the conclusion that the records and documents which

were the subject of the motion to suppress, were obtained through searches and seizures that would be illegal had they been conducted in the United States (274 F. Supp. 426).

In a criminal action involving the same documents, *United States v. Stonehill, et al.,* 254 F. Supp. 1003 (1966)[2] the United States District Court for the Southern District of New York found that "the Government appears to concede that if its representatives significantly participated in and contributed to the illegal searches in the Philippines . . . the material may be suppressed." (254 F. Supp. at p. 1004).

(2) The Exclusionary Rule Regarding Evidence Illegally Procured Applies to This Action.

The exclusionary rule with regard to evidence illegally obtained must apply to the instant case, despite the fact that it is labelled a "civil action." The Court below so found (274 F. Supp. at p. 425 [CT 55, 56]), citing Mr. Justice Brennan's opinion in *Wong Sun v. U.S.,* 371 U.S. 471 at 486, to the effect that the doors of the Federal courts must be closed "to *any* use of evidence unconstitutionally obtained." Appellee did not seriously contest below, and by consenting to the petition for permission to file this appeal, appears to concede in this Court, the applicability of suppression to the case at bar. The concession is consistent with the Government's failure to perfect an appeal in *United States v. Joseph A. Chase* (US DC DC), unreported, C.A. #2589-63 (1966), where the District Court suppressed illegally obtained evidence in a similar action under Sec. 7403 of Title 26, to reduce to judgment a tax liability based on a jeopardy assessment.

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[2]Later voluntarily dismissed by the Government against Defendant Stonehill and resulting in an acquittal after trial on the merits of the other defendants.

There is other precedent for suppression in civil cases to which the Government is a party. Evidence obtained by the Government in violation of the Fourth Amendment cannot be used by it "at all." *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385, 40 S. Ct. 182 (1920); *Rogers v. U.S.,* 97 F. 2d 691 (CA 1, 1938); *Berkowitz v. U.S.,* 340 F. 2d 168 (CA 1, 1965); *Powell v. Zuckert,* 366 F. 2d 634 (CA DC 1966); *Saylor v. United States,* 374 F. 2d 894 (Ct. of Cls. 1967); 8 *Wigmore on Evidence,* 1964 Supp., p. 10. Suppression of evidence can be sought in a civil suit, regardless of whether there is a criminal proceeding pending or not. *Goodman v. U.S.,* 369 F. 2d 166 (CA 9, 1966).

The case below involves a fifty per cent penalty and cases involving forfeitures and penalties are quasi-criminal in nature and subject to the exclusionary rule. *Boyd v. U.S.,* 166 U.S. 616, 6 S. Ct. 524 (1886); *Helvering v. Mitchell,* 303 U.S. 391, 58 S. Ct. 630 (1938); *Tovar v. Jarecki,* 173 F. 2d 449 (CA 7, 1949); *Lassoff v. Gray,* 207 F. Supp. 843 (US DC WD Ky., 1962).

In 1965, the U.S. Supreme Court held in *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 85 S. Ct. 1246, that the exclusionary rule of *Weeks v. U.S.* and *Mapp v. Ohio* applied to forfeiture proceedings.

The Internal Revenue Service, through its Associate Chief Counsel, publicly conceded that "[it] would be inadvisable to rely upon . . . evidence . . . illegally obtained by the Federal Government, especially by the Internal Revenue Service, particularly in cases where the 50% fraud penalty is involved, because of the *Plymouth Sedan* case." (Vol. 20, #1, Bulletin of the Section of Taxation, American Bar Ass'n., p. 51).

Thus, the court below erred in denying appellants' motion to suppress the evidence obtained in searches and seizures which are illegal under both U.S. and Philippine standards, and must be reversed on one or more of the grounds hereafter urged.

B. THE U.S. CONSTITUTION PROHIBITS THE USE IN A FEDERAL COURT OF EVIDENCE OBTAINED IN AN UNREASONABLE SEARCH AND SEIZURE.

(1) Synopsis of Appellants' Position.

Appellants' position is based on the Fourth Amendment to the United States Constitution as it has evolved to 1968. When the history of the Fourth Amendment is carefully examined, appellants' conclusion is irrefutable.

(2) The Fourth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

(3) The Historical Development of the Fourth Amendment and the Evolution of the Exclusionary Rule in the Decisions of the United States Supreme Court.

The very words of the Fourth Amendment that people's rights "shall not be violated," posits a right that

is clear, direct and unequivocal, but there is no hint in the constitutional language of a remedy if this right is violated. Because the first ten amendments to the Constitution have been held to be limitations on the federal government only, the Fourth Amendment was interpreted as saying that the people's right "to be secure . . . against unreasonable searches and seizures, shall not be violated" by the federal government. So we must first trace the development of the meaning of the Fourth Amendment by examining the cases that dealt with the people's remedies if the federal government violated the people's right to be secure against unreasonable searches and seizures.

The beginning point appears to be *Boyd v. U.S.*, 116 U.S. 616, 6 S. Ct. 526 (1886), wherein the Court held that the federal law which authorized the compulsory production of a claimant's documents in court in a forfeiture proceeding was unconstitutional and void under the Fourth and Fifth Amendments.

In *Weeks v. U.S.*, 232 U.S. 383, 34 S. Ct. 341 (1914), the Supreme Court held that the Fourth Amendment "is not directed to individual misconduct of such officials" as the police acting independent of federal authority and the evidence obtained by the police was not a problem under the Fourth Amendment; but the evidence obtained by the United States Marshal should have been suppressed because it was taken "in direct violation of the Constitutional rights of the defendant."

In *Gouled v. U.S.*, 255 U.S. 298, 41 S. Ct. 261 (1921), Justice Clark held for the Court: "[T]he secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only, by a representative of any branch

or subdivision of the government of the United States, is a violation of the Fourth Amendment." In reaching this conclusion, Justice Clarke commented as follows on the importance to political liberty and welfare of our country of the due observance of the rights guaranteed under the Constitution by the Fourth and Fifth Amendments:

> "The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers." (p. 263).

In *Byars v. U.S.*, 273 U.S. 28, 47 S. Ct. 248 (1927), the Court held that a federal agent's participation in a State-administered illegal search and seizure pursuant to a warrant makes the search a federal search and the materials therein seized are not admissible in a federal court. The Court said:

> "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when

> the federal government itself, through its agents acting as such, participates in the wrongful search and seizure. To hold the contrary would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official action." (p. 250).

In *Gambino v. U.S.,* 275 U.S. 310, 48 S. Ct. 137 (1927), Justice Brandeis, writing for the Court, held that evidence obtained by state troopers without any federal direction, presence or participation was nonetheless "obtained by invasion of . . . constitutional rights" and excludable as evidence because the state troopers were acting to enforce federal laws.

Thus, it is clear that by 1927, any search that violated the requirements of the Fourth Amendment rendered any evidence produced inadmissible in the federal courts if the federal government was the searcher, a participant, or the authority for the search.

On June 27, 1949, the United States Supreme Court decided two significant cases: *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359; and *Lustig v. U.S.,* 338 U.S. 74; 69 S. Ct. 1372.

In *Wolf v. Colorado,* Justice Frankfurter, writing for a divided court, held that evidence obtained under circumstances which would have rendered it inadmissible in a federal prosecution because it violated the Fourth Amendment was not thereby inadmissible in State Court prosecutions. However, Justice Frankfurter made clear that the due process clause of the Fourteenth Amendment did provide a right to be secure in one's privacy against arbitrary intrusion by the police; however, the enforcement of that right did not include the exclusion from evidence of materials so obtained from State Courts.

Justice Rutledge dissented on the basis that the Fourteenth Amendment included the Fourth Amendment, and that evidence obtained in violation of the Fourth Amendment was excludable, as a matter of constitutional law, both in the Federal and State courts. He said:

> "As Congress and this Court are, in my judgment, powerless to permit the admission in federal courts of evidence seized in defiance of the Fourth Amendment, so I think state legislators and judges —if subject to the Amendment, as I believe them to be—may not lend their offices to the admission in state courts of exidence thus seized. Compliance with the Bill of Rights betokens more than lip service." (p. 1368). Justice Douglas also dissented. He said:
>
> "I agree with Mr. Justice MURPHY that the evidence obtained in violation of it (Fourth Amendment) must be excluded in state prosecutions as well as in federal prosecutions, since in absence of that rule of evidence the Amendment would have no effective sanction." (p. 1372).

In *Lustig v. U.S., supra,* the issue was the admissibility in a federal prosecution of evidence obtained by city police through an unreasonable search and seizure. No federal agent requested the search nor was the search undertaken by local police to aid the enforcement of federal law, but a federal agent did assist in selecting some of the evidence to be seized. The Court held that evidence so obtained was not admissible in a federal prosecution because of the federal participation.

> "The crux of that doctrine is that a search is a search by a federal official if he had a hand in

> it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." (p. 1374).

Justice Murphy wrote a concurring opinion in which he said:

> "In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us." (p. 1375).

From these two landmark decisions in 1949, several conclusions can be drawn relative to the Fourth Amendment.

1. Part of the Court held that it not only guarantees a right of the people but it also contains an implicit remedy, namely, that evidence obtained by an unreasonable search and seizure was not admissible in any court no matter what officials participated in the search.

2. The majority of the Court held that evidence obtained by an unreasonable search and seizure was not admissible in a federal court if federal officials or federal law were involved in the search.

3. The majority of the Court held that evidence obtained by an unreasonable search and seizure by State officers violated the Fourth Amendment but such evidence was still not excluded from State courts.

It appears clear that the Court was changing its views relative to the Fourth Amendment so that this Amendment was being construed to contain not only a declaration of a right but also an implicit remedy which all courts must invoke whenever that right was violated.

But evidence obtained by an unreasonable search and seizure committed exclusively by State officials and without any knowledge or participation by federal officials and without any reliance on federal law was still admissible in federal court. This was the "silver platter doctrine."

In 1960, the Court abolished the "silver platter doctrine." In *Elkins v. U.S.*, 364 U.S. 206, 80 S. Ct. 1437, State officers made an unlawful search and seizure and the State court so held, but the same evidence was turned over to federal officials on a "silver platter" and admitted into evidence in federal court. This court affirmed the conviction (266 F. 2d 588). Justice Stewart delivered the opinion of the United States Supreme Court reversing the conviction and abolishing the silver platter doctrine. He wrote:

> "For these reasons we hold that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial. In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." (p. 1447).

Four justices dissented and Justice Frankfurter wrote a dissenting opinion in which Justices Clark, Harlan, and Whittaker joined. He said:

> "The Court asserts that there is no longer any logic in restricting the application of the Weeks exclusionary rule to the fruits of federal seizures, for Wolf recognizes that state seizures may also encroach on interests protected by the Federal Constitution. The rule which the Court announces on the basis of this analysis is that there is to be excluded from federal prosecutions all evidence seized by state officers 'during a search which, if conducted by federal officers would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment.' As the Court's rule only purports to exclude evidence seized by state officers in violation of the Constitution, it is plain that the Court assumes for the purposes of these cases that, as a consequence of Wolf, precisely the same rules are applicable in determining whether the conduct of state officials violates the Constitution as are applicable in determining whether the conduct of federal officials does so, and precisely the same exclusionary remedy is deemed appropriate for one behavior as for the other.
>
> "In this use of Wolf the Court disregards not only what precisely was said there, namely, that only what was characterized as the 'core of the Fourth Amendment,' not the Amendment itself, is enforceable against the States, but also the fact that what was said in Wolf was said with reference to the Due Process Clause of the Fourteenth Amendment, and not with reference to the specific guarantees of the Fourth Amendment. The scope and effect of these two constitutional provisions cannot be equated, as the Court would have it." (pp. 1455, 1456).

The *Elkins* decision then, as the dissent pointed out, added one more dimension to the evolving meaning of the Fourth Amendment. At least as far as federal courts were concerned, it did not matter who made the illegal search and seizure—that the emphasis was now gone; the critical factor was that the Fourth Amendment itself prohibited the admission into evidence of anything obtained by an unreasonable search and seizure *no matter who did the searching and seizing.* This was a fundamental departure from the earlier interpretation of the Constitutional right and a vital step in the evolution of the Fourth Amendment. The Fourth Amendment itself provides a remedy in the act of declaring the right. Under the *Elkins* gloss the Fourth Amendment now means that the people are secure from unreasonable searches and seizures, and in federal courts any evidence so obtained is excluded no matter who obtained it.

There is one further step we must take in this evolutionary process.

One year after *Elkins,* the Court decided *Mapp v. Ohio,* 267 U.S. 644, 81 S. Ct. 1684 (1961). Mr. Justice Clark, writing for the Court, reviewed the Court's holdings in *Boyd, Weeks, Byars, Wolf, Elkins,* and others and then held:

> "Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence ob-

tained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (p. 1691).

* * *

"Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy —be also insisted upon as an essential ingredient of the right newly recognized by the Wolf case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." (p. 1962).

* * *

"Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense." (p. 1693).

* * *

"Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." (p. 1694).

Mr. Justice Black wrote a concurring opinion, in which he said:

> "I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since Wolf, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." (p. 1695).

Mr. Justice Douglas also wrote a concurring opinion. Mr. Justice Harlan wrote a dissenting opinion in which Justices Frankfurter and Whittaker joined in full and Mr. Justice Stewart Joined in part. He said:

> "Essential to the majority's argument against Wolf is the proposition that the rule of *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 632, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the 'supervisory power' of this Court over the federal judicial system, but from Constitutional requirements. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts." (p. 1704).

Thus, we have traced the evolution of the Fourth Amendment over many years until today it clearly contains not merely a declaration of a right but also a remedy for the violation of that right: evidentiary exclusion. It is no longer a question of who searched, but rather whether there was an unreasonable search and seizure. Evidence thus obtained is not admissible in a federal court on Constitutional grounds.

C. THE UNITED STATES CONSTITUTION PROTECTS UNITED STATES CITIZENS RESIDING ABROAD.

In grounding its denial of the motion to suppress on *Brulay v. U.S.*, 383 F. 2d 345 (CA 9 1967), the District Court overlooked differences of fact and applicable law between the *Brulay* case and the instant case.

Most of the factual distinctions will be argued *infra* except the one factual distinction on which a most important legal distinction between *Brulay* and the case at bar is based: In *Brulay,* the defendant did not reside abroad nor was there any U.S. exercise of jurisdiction over him while he was abroad. In *Stonehill,* the appellants were legal residents of Manila, and the United States, through its Internal Revenue representative for the Far East, was acting in Manila to enforce the liability for U.S. Federal income taxes of two American citizens. It had stationed in Manila a Senior Revenue officer with the title of Revenue Representative [RT 76, 77], who maintained a regular staff of at least three assistants for this purpose, which staff was augmented by two more people detailed to Manila expressly to act against Stonehill and Brooks, who resided there.

Thus the analogy to cases where U.S. military agencies abroad exercise jurisdiction over United States citizens residing there, is compelling.

American citizens who are residents abroad (particularly in a country which observes constitutional and legal standards patterned after, and practically identical with, U.S. standards) are entitled to the protection of the Fourth and Fifth Amendments of the U.S. Constitution in proceedings seeking to enforce a liability for Federal taxes which Congress was able to impose only because of the Sixteenth Amendment of the same Constitution. A different holding would lead to absurd and unfair results.

It is respectfully submitted that "the Constitution follows the flag,"—not only the American flag that Mr. Chandler, the Internal Revenue Service officer displayed in the Internal Revenue Office in Manila where he collected taxes from American taxpayers, but also the American flag that the American appellants proudly displayed in their homes and offices in that same city.

The U.S. Supreme Court and the appellate courts of several circuits so hold.

In the leading case on this issue, *Reid v. Covert,* 354 U.S. 1, 77 S. Ct. 1222 (1957), the Supreme Court held:

> "At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. *When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.* This is not a novel concept. To the contrary, it is as old as government." [Emphasis supplied] (p. 5).

The United States in the instant case "acted abroad." It collected taxes. It collected evidence. It "reached out [for] a citizen who [was] abroad."

The Court in *Reid v. Covert* went on to say:

> "This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments." (p. 8).

The Supreme Court enumerated cases in which some of the constitutional requirements had been enforced by the Supreme Court and other Federal courts on behalf of citizens residing abroad: *Balzac v. Porto Rico,* 258 U.S. 298, 312-313 (Due Process of Law); *Downes v. Bidwell,* 182 U.S. 244, 277 (First Amendment, Prohibition against Ex Post Facto Laws or Bills of Attainder); *Mitchell v. Harmony,* 13 How. 115, 134 (Just Compensation Clause of the Fifth Amendment); *Best v. United States,* 184 F. 2d 131, 138 (Fourth Amendment); *Eisentrager v. Forrestal,* 84 U.S. App. D.C. 396, 174 F. 2d 961 (Right to Habeas Corpus); rev'd on other grounds *sub.nom. Johnson v. Eisentrager,* 339 U.S. 763; *Turney v. United States,* 126 Ct. Cl. 202, 115 F. Supp. 457, 464 (Just Compensation Clause of the Fifth Amendment) (*Reid v. Covert, supra,* p. 8, ftn.10).

In *Kinsella v. Singleton,* 361 U.S. 234, 80 S. Ct. 297 (1960), in his concurring opinion, Justice Whittaker said:

> "The cases present grave questions and, for me at least, ones of great difficulty. Our recent decision in Reid v. Covert, 354 U.S. 1, makes clear that the United States Constitution extends beyond our territorial boundaries and reaches to and applies within all foreign areas where jurisdiction is or may be exercised by the United States over its citizens—that when the United States proceeds against its citizens abroad '[i]t can only act in accordance with all the limitations imposed by the Constitution.'" (p. 261).

The United States Internal Revenue Service clearly exercises jurisdiction abroad when taxing U.S. citizens who are permanent residents abroad. It exercises jurisdiction when it maintains offices abroad and dispatches agents to gather evidence abroad. It exercises jurisdiction when it instructs its agents to act "in liaison" with foreign police officers to gather information on U.S. citizens abroad. Chandler testified how he exercised jurisdiction abroad:

> "The Court: May I ask a question here? You were an investigative officer, weren't you, your prime duty was to make investigations?
>
> The Witness: No, my prime duty is to represent the Internal Revenue Service throughout the Far East. I did occasionally make—
>
> The Court: Let's see, now. The Internal Revenue Service is primarily interested in two phases; one is the collection of taxes, and the other is to make investigations. Now, you didn't have anything to do with the collection of taxes, I don't suppose?

The Witness: Yes, I did.

The Court: You were the collector?

The Witness: I was the collector, too.

The Court: All right. What else did you do? You were the collector, you made investigations; and what else did you do as a representative?

The Witness: Well, we tried to establish liaison with the tax authorities, police authorities, throughout the countries, to develop sources of information on American taxpayers. We did audit examinations, informal conferences prior to the appellate level, collection cases.

The Court: Part of that is investigation, isn't it?

The Witness: Yes. Informal conferences. We had a tax treaty up in Tokyo that our office in Washington is the competent authority for, we handled the matters back and forth between the Japanese government under the treaty. Once in a while the Intelligence Division wanted to know something out in the area, and we would make a collateral inquiry for them. We would initiate information according to what we heard in the area concerning the taxes of the Americans.

The Court: I assume from what you say that you did everything that the Internal Revenue wanted done in that particular area?

The Witness: Yes, sir." [RT 76-77].

This sweeping exercise of jurisdiction abroad over U.S. citizens there residing must be in accordance with constitutional limitations; it must be lawful in all its aspects. It can neither directly nor indirectly strip the U.S. citizen of his constitutional rights.

Powell v. Zuckert, 366 F. 2d 634 (CA DC 1966), involved the discharge of a civilian employee of the Army from his job with the Air Force in Japan.

> "The facts are undisputed. While employed by the Air Force in Japan [Powell] resided with his family at an off-base private dwelling. Armed with a Japanese search warrant obtained pursuant to a request by the Air Force Office of Special Investigations (OSI), OSI agents and Japanese officers searched appellant's home. The search was a general one, the Japanese warrant reciting that objects to be seized in the search included: 'Typewriters, United States property, official documents, memos, diary, documents, everything in relation to this case.'" (pp. 635, 639).

A Japanese search warrant in *Powell*—a Philippine search warrant in *Stonehill;* U.S. agents inspecting and obtaining the evidence seized both in *Powell* and in *Stonehill.* The Powell search warrant asked for ". . . documents, memos, diary, documents, *everything in relation to this case*"; the Stonehill search warrants called for "all books of accounts, financial records, vouchers, correspondence, receipts, ledgers, journals, portfolios, credit journals, typewriters and other documents and/or papers *showing all business transactions* . . ." [Exs. M-Z, AA-AL].

The Court in *Powell* held that the Japanese search warrant was illegal by Fourth Amendment standards (*ibid.,* at p. 640) without deciding whether it was legal under Japanese standards as the Government contended. In the instant case, the warrants are illegal under both United States *and* Philippine standards.

Powell also was a civil case. The Court suppressed the evidence on the authority of *Reid v. Covert, supra.* The *Powell* case did so without relying on participation or investigation, although it mentioned *obiter dictum* that U.S. agents had requested and participated in the search (at p. 640).

Reid v. Covert, Best v. United States, Kinsella v. Singleton and *Powell v. Zuckert* clearly establish that an American residing abroad is clothed with all the privileges and immunities that the United States Constitution grants him. The Government cannot try him without a jury; it cannot discharge him from his job on the basis of evidence obtained with the help of Japanese police under a Japanese search warrant that was illegal under the Fourth Amendment; it cannot tax him on evidence obtained with the help of Philippine police under a Philippine search warrant which was illegal under the Fourth Amendment.

United States involvement in the illegal search is not the criterion. It is the U.S. citizen who is *protected* by *Powell v. Zuckert,* not the Japanese officer (or even the OSI agent) who is to be *deterred.* It is the exercise of United States jurisdiction—court martial, civil service employment, taxation—which confers the protection and invokes the constitutional standard. Whether such standards are violated by Japanese or Philippine policemen matters not—the Federal Government may not avail itself of the fruits of the violation; it cannot do indirectly to the United States citizen abroad that which it cannot do directly, exercise jurisdiction over him without observing his constitutional rights.

D. THE FACTS AS FOUND BY THE DISTRICT COURT CONSTITUTE SUFFICIENT FEDERAL INVOLVEMENT TO MAKE THE SEARCHES IN SUBSTANCE SEARCHES BY FEDERAL AGENTS.

1. The District Court Should Have Granted Suppression on the Authority of Corngold v. U.S.

The District Court, after having found that the searches were illegal both under Philippine constitutional standards (274 F. Supp. at 424) and under U.S. constitutional standards (*ibid.,* at p. 426), was ready to hold on the authority of *Elkins v. U.S.,* 364 U.S. 206, that the evidence should be suppressed because:

> ". . . there would seem to be little distinction between illegal searches by state officers [Elkins] and illegal searches by foreign officials [Stonehill] when, as a result of such searches the U.S. District Court is required to rule upon the admissibility of the evidence seized." (*ibid.,* at p. 425).

Apparently, only this Court's decision in *Brulay*—misinterpreted by the District Court—prevented it from doing so.

The District Court held that *Elkins* established the post-1960 rule in "participation" cases (274 F. Supp. at p. 425). Actually, Elkins is the land mark case which did away with the requirement to show "participation" or "Federal involvement," under the theretofore prevailing "silver platter doctrine":

> "The question is this: May articles obtained as the result of an unreasonable search and seizure by state officers, *without involvement of federal officers,* be introduced in evidence against a defendant over his timely objection in a federal criminal trial?" (Emphasis supplied.) (364 U.S. 206, at pp. 208-209, 80 S. Ct. 1437 at 1439).

In *Elkins,* the Supreme Court answered this question in the negative. 364 U.S. at 223, 80 S. Ct. at 1447.

Therefore, under the theory of the District Court expressed in its opinion, that under *Elkins* evidence unconstitutionally obtained cannot be used in any federal proceedings, regardless of federal involvement or foreign source; all evidence regarding participation in the searches by federal officials became irrelevant and all findings relating to participation at least were practically *obiter dictum.*

It is for this reason, appellants feel, that the District Court made only limited findings of intermediate fact as to participation, although the case below was tried and briefed primarily on the participation issue.

As shown, *supra,* in section B of this argument, the logic of *Elkins* is compelling. The Supreme Court's holding in *Elkins* should indeed be interpreted to require suppression, regardless of whether the illegally obtained evidence was handed to U.S. agents on a "silver platter" by State police officers or on a "bamboo platter" by Philippine NBI agents.

But, assuming for the purpose of this section of appellants' argument, that the distinction made in *Brulay* between illegal searches physically conducted by police officers of one of the fifty States and illegal searches physically conducted by officers of a foreign country will be adhered to by this Court, the *intermediate* findings of fact on U.S. involvement that the District Court made, are sufficient to warrant an *ultimate* finding of fact and a conclusion of *law* that there was sufficient federal involvement in this case to make the searches "in substance a search by federal agents," requiring the application of this Court's *en banc* decision in *Corngold*

v. U.S., 367 F. 2d 1, rather than the application of *Brulay*.

The following intermediate findings of fact on U.S. involvement were made by the District Court:

1. "Meetings [between U.S. and Philippine officials] were held to determine the *modus operandi* of the raids." "Some of the[se] meetings were held in the home of U.S. Revenue Agent Robert Chandler" [274 F. Supp. at p. 422, par. 1, Col. 1; CT 46, lines 5-7].

2. "At one of the various meetings of . . . the Philippine National Bureau of Investigation (at which Robert Chandler was also present) the premises to be raided were mentioned." The Army-Navy Club was not included on the list of premises to be raised. *It was placed on the list and searched subsequently, only because* of the request or "suggestion" *of U.S. Agent Chandler.* [274 F. Supp. at p. 422, Col. 1, 2d par.; CT 46, lines 8-16]. (Appellants' most important personal and financial records were seized there and were ultimately turned over to the United States).

3. A diagram of premises occupied by two Stonehill companies was drawn by U.S. Agent Robert Chandler [Ex. J in evidence; *ibid.*, p. 422, Col. 1, 3d par.; CT 46, lines 18-26].

4. A memorandum relative to a building occupied by a Stonehill company, the Goodrich Building, was prepared by Robert Chandler prior to the raids (*ibid.*, p. 422, Col. 1, 3d para.) [CT 46, lines 22, 23].

5. Both Exhibits I and J, the diagram and the memorandum "thereafter came into possession of the Philippine National Bureau of Investigation." [*ibid.*, p. 422, Col. 1, 3d par., CT 46, lines 24-26].

6. Just prior to the raid a copy of one of the [42 identical] search warrants was shown to Robert Chandler, who, upon examining the document, stated that he knew nothing about search warrants but that the contents appeared to be all right [*ibid.*, p. 422, Col. 1, 4th par., CT 46, lines 29-32; CT 47, line 1].

7. In the course of the various meetings prior to the raids, Chandler was promised that he would be permitted to examine and copy the documents and records which the Philippine National Bureau of Investigation would obtain in connection with appellants' and their companies' activities [*ibid.*, p. 422, Col. 1, last par, cont'd into Col. 2, CT 47, lines 3-8].

8. On March 3, 1962, the day of the raid, Robert Chandler and two agents sent by Washington were stationed near a structure owned by the Philippine National Bureau of Investigation and waited there until that evening when they were requested by the NBI Director to come to his office to look at the documents and records seized by the NBI in the searches of appellant's premises [*ibid.*, p. 422, Col. 2, second par., CT 47, lines 9-23].

9. On the following day arrangements were made for Chandler to copy or photograph the records and documents seized [274 F. Supp., p. 422, Col. 2, 3d par., CT 47, lines 29-31].

The facts in *Corngold* were summarized by this Court in *Gold v. U.S.*, 378 F. 2d 588 (1967), at pp. 590 and 591:

"In *Corngold* government agents observed the defendant deliver packages to a Trans-World Airlines agent at the Los Angeles International Air-

> port. When the defendant departed, the government agents informed the transportation agent that they suspected that the packages contained smuggled watches and that they would like to inspect the shipment. They also pointed out that the shipper had incorrectly filled out the air waybill. The transportation agent testified that the government agents asked him to open the package. The employee initially opened one package while the government agents looked on, and then the agents completed opening the package. They found a number of small boxes inside the large package and removed and opened them. They found contraband watches and marked the small boxes for future identification."

These *Corngold* facts are parallel with, if not exceeded by, the above nine findings of United States involvement in *Stonehill* made by Judge Westover.

In *Corngold,* Government agents observed the defendant deliver packages to TWA; in *Stonehill,* their suspicions were aroused by the informer Spielman. In *Corngold,* the Government agents told the TWA agent they would like to inspect the shipment; in *Stonehill,* the District Court found as a fact that the key location (the Army-Navy Club) was searched only because of the U.S. agent's request, after meetings were held at his home where the "modus operandi" of all the searches were discussed. In *Corngold,* the Government agents asked the TWA agent to open the package; in *Stonehill,* the District Court found that Chandler drew diagrams of and memoranda regarding the premises to be searched. These diagrams included instructions to check and search for certain specific items [Deft. Ex. J]. The memorandum delivered to the NBI agents [Ex. I] included instructions to "confiscate" certain records and "take apart" a certain office.

In *Corngold,* the agents pointed out that the shipper had incorrectly filled out the waybill; in *Stonehill,* the agent pointed to unspecified Philippine violation of laws, examined the Philippine search warrants, and stated that they appeared to be "all right." In *Corngold,* the agents inspected smuggled watches and marked the boxes for future identification; in *Stonehill,* the trial Judge found as a fact that the agents were promised in advance that they could inspect and copy the fruits of the raid, that arrangements were made for them to do so, and that they did in fact inspect, mark for future identification and copy the seized material.

Of course, the facts as actually shown by the evidence in *Stonehill* are much stronger than those recited by the court in these limited findings of intermediate facts included in the Court's opinion. Appellants will so demonstrate in the last section of this argument.

In the above comparison, appellants limited themselves solely to facts as found by the District Court. The District Court's failure to take into consideration sealed Exhibit E and the plethora of other evidence of United States involvement it completely disregarded, emphasizes the importance of the above findings of fact which the trial judge included in his opinion.

These nine findings of fact excerpted from the Court's opinion, *supra,* in and of themselves clearly show that the District Court's conclusion of law—to the effect that there was no U.S. participation or instigation—is clearly erroneous. On the basis of these nine findings of fact alone, the District Court should have concluded that the searches were, in substance, Federal searches and that the evidence must be suppressed on the authority of *Corngold.*

2. Brulay Distinguished.

The District Court denied suppression on the authority of *Brulay v. U.S.,* 383 F. 2d 345 (1967). It is respectfully submitted that *Brulay* is distinguishable on the facts from the case at bar. More important, the rule of law laid down by *Brulay* is not what the District Court held it to be: a requirement that without a finding that the Stonehill searches were the result of U.S. *instigation,* there could be no suppression.

Henry Brulay, an American citizen and a resident of California, was stopped, arrested and his car was searched by two municipal police officers in Tijuana, Mexico. The arrest and search were brought about by the observation of Tijuana officers that the car "looked heavy in the rear," (338 F. 2d 345, 346). There was no action of any kind by U.S. agents which led to, or in any way caused the search to be made by the Tijuana municipal police. U.S. Customs Agents had alerted Mexican Federal agents but there was no finding by the Court, nor any showing on the record that the Tijuana Municipal policemen who made the seizure had been in contact with the Mexican federal police, let alone with the U.S. Customs Agents (at p. 348).[3] The facts in *Brulay,* therefore, show no U.S. involvement at all except the single telephone call. But this call was not traceable from the U.S. agents to the arresting or search-

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[3]Because of the importance of this factual distinction, appellants did not limit research to the reported decision in *Brulay,* but examined the record and briefs, including those filed in the Supreme Court. It appears uncontested that the federal Mexican police (not the Tijuana police) had been contacted by U.S. Customs officers a few days prior to the arrest (*Brulay record* pp. 26-28); the Tijuana officer appeared to have no knowledge of the U.S.- Mexican federal police communication (*Brulay record,* Vol. 2, pp. 14-17, 59), but stopped the automobile (having been assigned to investigate auto thefts) because it had been "going quite fast and appeared to be heavily loaded" (*Brulay* record, pp. 11-13, 17, 36-37—31-54; 36-57-58, volume 2).

ing officers. In *Stonehill,* on the other hand, the District Court expressly found as intermediate facts presearch meetings between U.S. and foreign agents at the U.S. agent's home, where the "modus operandi" of the searches were discussed, the selection of a key search location (Army-Navy Club) by the U.S. Agent, written instructions delivered to the foreign officers as to where to search and what to seize [Exs. I, J]—a far cry from the ineffectual B*rulay* telephone call.

Another important distinction between *Stonehill* and *Brulay:* In the case at bar, the searches were held to be illegal under the law of the country where they were made; in *Brulay* the officers making the search in Mexico were not violating Mexican law in stopping and searching the car and arresting Brulay (*Brulay* record, Vol. 2, pp. 14, 15, 17, 58-59) (383 F. 2d at p. 348).

In short, the facts in *Brulay* do not include *any* findings of U.S. involvement while in *Stonehill* the District Court expressly found nine instances of U.S. involvement.

Therefore, *Brulay* and *Stonehill* are completely distinguishable on the facts. But we respectfully urge that the District Court also misinterpreted the rule of law of *Brulay.* Misreading a small section of the *Brulay* opinion, the court gave unwarranted emphasis and meaning to the single word "instigation."

This court said in *Brulay* at p. 348:

> ". . . No United States officers participated in the questioning at or prior to the time of the seizure and although the customs agents of the United States had *alerted Mexican Federal* police to the defendant's activities, the Tijuana *municipal policemen who made* the seizure were not acting at the *instigation* of United States customs or narcotics officials." (Emphasis supplied).

It is clear from the emphasized language in the above excerpt from *Brulay* that the quoted part of the opinion is a mere finding of fact to the effect that it was the *federal* police who had been alerted and not the *Municipal* police, and that the Court in using the word "instigation" in this part of the opinion, did not intend to lay down a broad rule of law that evidence can be suppressed only if a defendant proves "instigation" of a search by U.S. officials. On the contrary, it appears to appellants that this Court used the words "acting at the instigation" in the second part of the above quoted sentence in the same sense as the word "alerted" in the first part of the sentence, in finding as a fact that because U.S. officials had alerted the Mexican federal police and not the Tijuana municipal police, Brulay could not possibly claim that the search was caused by the U.S. telephone call. The decision of this Court might have been different if Mexican Federal police, who had been in contact with the U.S. agents, had arrested Brulay, or if the Tijuana municipal policemen had done so in pursuance of the U.S. alert. But the Court never reached the question of quantity of U.S. involvement because *no* connection whatever between the U.S. call and the Mexican arrest was shown by Brulay.

Of course, this Court in *Brulay* did not intend to lay down a new rule requiring proof of "instigation" as the condition precedent for suppression. Nor did this Court use the word "instigation" as a defined or legal term (excluding all other Federal involvement). The Court did not overrule or even mention in *Brulay* its holding in *Corngold*. The rationale of *Brulay* that the Fourth Amendment is designed to deter federal and state policemen and that neither the Fourth nor the Fourteenth Amendments can be directed at Mexican officials, applies with equal force to the airline officials of *Corngold*. Federal *involvement* or non-involvement is

the criterion which both under *Brulay* and *Corngold* controls application of the exclusionary rule in Federal Courts, when illegal searches are not physically conducted by Federal or State officers. Federal involvement makes such illegal search, in substance, an illegal "federal search," *Corngold, supra,* regardless of whether this federal involvement consists of setting the search into motion (instigation), as defendant unsuccessfully contended in *Brulay,* or of being otherwise involved in it (participation) as in *Corngold.*

The uncontradicted and completely one-sided evidence before the District Court, however, showed both instigation *and* participation in *Stonehill.* The District Court committed a grave error in not so holding as a matter of law, as appellants will show in the next and last section of their brief.

One more distinction from the facts in *Brulay* is that most of the records involved in *Stonehill* are personal financial records of appellants. They are protected not only under the Fourth but also under the Fifth Amendment to the Constitution. *United States v. Jackson,* 322 F. 2d 460, CA 9 (1963); *United States v. Cohn,* CA 9 20921, decided Dec. 19, 1967, 9 Cal. Disc. Proc. 38 .... F. 2d ..... Under this Court's distinction between Fourth and Fifth Amendment violations abroad (*United States v. Brulay,* 383 F. 2d, at 349, n.5), the violation of the Fifth Amendment commenced by the illegal seizures in Manila, would be completed only upon admission of the records in evidence in the Federal Court and thus occur within the United States. For this reason these records are inadmissible even under *Brulay.*

E. THE UNCONTRADICTED EVIDENCE BEFORE THE DISTRICT COURT REQUIRES A FINDING OF ULTIMATE FACT AND CONCLUSION OF LAW THAT THERE WAS U.S. INSTIGATION OF, AND PARTICIPATION IN, THE ILLEGAL SEARCHES.

Appellants have shown that the District Court made nine findings of fact which on the authority of *Corngold* alone constitute "participation" by the U.S. federal agents in the illegal March 3, 1962 searches. Reading the forepart of the District Court's opinion, as reported at 274 F. Supp., pages 421, 422 and 423, and the first column of page 424 beginning CT 43 through line 14, of CT 52, one familiar with this Court's holding in *Corngold* and the Supreme Court's decisions in *Byars v. U.S.,* and *Lustig v. U.S.,* can expect only one conclusion of law: the "participation" by U.S. agents in the illegal searches of March 3, 1962, made the searches, in substance, searches by federal agents. After reading these findings of intermediate fact, and some of the Court's statements during the hearing, the completely unexpected and unsupported one hundred eighty degree turn by the District Court comes as an unexplainable shock.

During the hearing the Court said:

> "The Court: Now, there is no question but what the United States officials, the representative knew of the raid. * * * There is *no question* that they had *meetings, that Mr. Chandler participated in certain meetings in which the raids were discussed.* * * * Now, we have certain *instances where Mr. Chandler gave advice,* such *as including the Army and Navy Club.*"

The Court: I don't think there is any question that the United States authorities knew that there was going to be some sort of an action taken against Stonehill. It seems to me that the evidence would indicate that they *knew that there was a search to be made or seizure to be made in the immediate future.*" [Tr. 1243].

"The Court: And *I think I am going to have to find there was a participation.*" [Tr. 1243].

"The Court: It is true that they [U.S. agents] were consulted and it is true that they knew about the raids and it is true that, *I think we have at least two instances that there was participation,* that is, at one time; *at one time Mr. Chandler testified that there was a meeting and he was there at the meeting and he asked if they had included the Army and Navy Club and they said 'No,' and then he suggested that they include it* [and got key records which were turned over to the U.S.]. That is at least one example of participation." [Tr. 1196].

Without reference to any fact, the Court in the opinion suddenly made a determination that "[this] contention of instigation is rejected by this Court, as the evidence is clearly to the contrary." [274 F. Supp. 424, CT 52, lines 20, 21]. Similarly, in the next paragraph [CT 52, beginning on line 30, to CT 53, ending on line 7], the Court states, despite its own enumeration in the opinion of at least nine instances of participation:

"The record is unequivocal that neither Robert Chandler nor any other U.S. government official or employee participated in or was present at or a party to the raid conducted by the Philippine National Bureau of Investigation."

—all contrary to the Court's own findings in the forepart of the opinion. The conclusions are also contrary to the weight of the uncontradicted evidence before the District Court, which included instances of involvement by the federal agents freely admitted by them but completely disregarded in the written opinion of the District Court.

The only apparent basis on which the District Court appears to reject the overwhelming evidence of instigation and participation are its erroneous findings of intermediate fact that (1) "the Philippine officials had defendants under investigation for consummation of contemplated deportation proceedings" [p. 424, second column, second para.; CT 52, lines 21 through 23; 274 F. Supp. 420, 421; CT 45, lines 14 to 20]; (2) that the extent of any participation by Robert Chandler was knowledge that a raid was in contemplation of the Philippine authorities [p. 424, 3rd para.; CT 53, lines 1-4]; and (3) that Chandler "negated any procedure which included raiding" [CT 46, lines 1 and 2; p. 422 of the reported opinion, 1st column, top 3 lines].

The overwhelming and uncontradicted evidence of record shows that (1) the District Court's finding of a pre-existing deportation investigation is completely erroneous, and against the weight of all of the evidence; (2) that Chandler did not "negate" the searches, but only desired postponement thereof until his agents from Washington had reached Manila; and (3) that not only Chandler, but two other Revenue agents, Ragland and Reynolds, were physically and personally present during the raids, and physically and personally selected records to be seized. The U.S. agents directed and otherwise participated in, the illegal searches—to a degree unparalleled in the history of federal participation in searches made by non-federal officers.

(a) There Was No Pending Philippine Investigation of Appellants Prior to February or March of 1962.

The District Court's findings that for some time before Colonel Lukban's [January 7, 1962] interview with Mr. Spielman, "the Philippine National Bureau of Investigation had been engaged in gathering evidence for use in 'deportation proceedings' against Stonehill and Brooks" [274 F. Supp. 420, 421; CT 45, lines 14-20] and that "[t]he Philippine officials had defendants under investigation for consummation of contemplated deportation proceedings" [274 F. Supp. 424; CT 52, lines 21-23], are erroneous and against the weight of the evidence.

On the contrary, the uncontradicted evidence shows that there was no investigation or proceedings of any kind against Stonehill and Brooks pending before Lukban's interview with Spielman (the Embassy meeting of January 27) [RT 140-142]. Certainly no Philippine deportation proceedings were pending at that time. The first one to contemplate the deportation of appellants was not a Philippine official but the American Minister at the Embassy in Manila, who, on January 9, 1962, told Chandler that the American Embassy wants not only to get Stonehill out of the Philippines, but to keep him out [Ex. E]. It was the Embassy's opinion that appellant Stonehill had been very influential with the previous administration and would be even more so with the administration elected in November [Pl. Ex. 11; Def. Ex. E]. If deportation proceedings had even been contemplated by the Philippine authorities at that time, the Embassy would have known about it and certain Colonel Lukban, the NBI Director, would have mentioned it to Chandler on January 27.

The evidence shows:

(i) On January 9, 1962, the American Embassy decided to get Stonehill out of the Philippines. Although both the FBI agent and the IRS agent saw the new Minister of Justice socially in early January [Ex. 12, p. 19], and kept close liaison with Philippine law enforcement officers [RT 77], no Philippine proceedings of any kind against Stonehill were mentioned by any Philippine law officers at any time before February 1, 1962. Obviously, none were pending or contemplated.

(ii) Secretary Diokno, who had assumed office in January of 1962 first accepted the idea of a deportation proceeding some time in February of 1962 [RT 197], and then only for a limited purpose. According to U.S. agent Chandler's testimony, "deportation" was first mentioned by Diokno a week after the secret February 1 meeting in the Columbian Club between Chandler and the Secretary [RT 197-198]. Diokno told Attorney General Kennedy's assistant at Hong Kong that he would conduct the investigation "outside of ordinary Philippine Government channels." [Ex. AZ]. This is proof that the Philippine Government had no deportation or other proceedings pending against Stonehill and Brooks.

Still according to Chandler, the deportation charge was to be used by Diokno not (as the District Court erroneously stated in its opinion) for the purpose of deporting appellants as undesirable aliens (274 F. Supp. at 421) [CT 45, lines 19, 20], but as a pretext to make sure that appellant Stonehill could not get out on bail. Testifying about his discussion with Secretary Diokno held sometime between February 1 and February 8, "when [Diokno] made

this visit to [Chandler's] house" [RT 197], Chandler said:

"Q. Did he [Diokno] say he would arrest Mr. Stonehill at the time? A. Yes. He spoke of a deportation charge that he thought *would be the avenue* that he would move on. [Emphasis added].

Q. Did he give you the reason why he thought there would be a deportation charge and not a criminal investigation? A. Yes. He said the reason why there would be a deportation charge is because it was no bailable offense. He could not get out on bail." (Pp. 198-199).

(iii) That there was no deportation proceedings pending even as late as March 3 is also borne out by the text of the search warrants [Exs. M-Z; AA-A]. None of them mentioned deportation; none of them were issued by the Deportation Board or by or on the request of an immigration or other official concerned with deportation cases. On the contrary, the search warrants were made out on forms which had printed on them the words: "*Criminal* Case No. ...." and in the blank provided for the specification of the proceedings or investigation for the purpose of which the search was to be conducted, appeared the words: "Violation of Central Bank Laws, Tariff and Customs Code, Internal Revenue Code and the Revised Penal Code." Any reference to deportation proceedings was conspicuously absent.

(iv) There was no evidence that any section of the Department of Justice having anything to do with immigration, deportation or alien control, had any indication of a deportation proceeding until the very morning of the raids.

Major Del Rosario, the Secretary's "right arm," speaking about his activities on March 3, 1962,

beginning on RT 852, testified that on March 3rd, for the first time, Secretary Diokno presented deportation charges to the Under Secretary. The Under Secretary then and there "read them over" and signed the deportation warrants of arrest [RT 852, 853].

(v) Of course, Secretary Diokno, who had just taken office, could not have initiated any deportation proceedings, or even an investigation, against appellants prior to the end of January. The evidence is clear and uncontradicted that no one else, including his NBI chief who (not unlike the U.S. FBI chief) had served previous Secretaries of Justice had no investigation of appellants pending prior to the January 27 meeting. Here, again, from the mouth of the chief U.S. agent, Mr. Chandler, comes this testimony on the January 27, 1962 meeting, the first contact between U.S. and Philippine agents on the *Stonehill* case:

"Q. Now, Mr. Chandler, at or prior to the close of the meeting, did Colonel Lukban make any promises to Mr. Hawley and yourself with respect to further action? A. Well as to the—to us as a group, that is, Mr. Spielman, Mr. Hawley and myself; he said that he would inquire into it and that if Mr. Spielman's story was found to be correct, he would investigate it even if he had to go all the way to Malacanang [Philippine White House] to get it approved." [RT 143].

It is self-evident that Colonel Lukban, the Acting NBI Director, was speaking of an investigation that he might make in the *future*—not one that he had been conducting all along; an investigation that he could not or would not initiate even himself without the approval of his superior. This investigation was "promised" to Chand-

ler by Director Lukban on January 27, 1962. It had to be authorized first by Secretary Diokno. It finally was approved by President Macapagal of the Philippines on February 5, 1962. All of this transpired after (and we submit, *because*) the U.S. agents, beginning on January 27, 1962, "sold" the Philippines officials on the investigation.

(b) United States Officials Induced the Philippine Officials to Initiate the Investigation of Appellants.

Having shown that there was no antecedent Philippine investigation of appellants, appellants now turn to the evidence showing that Philippine action was triggered and induced, *i.e.* instigated, by the U.S. agents. The American decision to proceed against Stonehill and to get him out of the Philippines was made on January 9, 1962 [Ex. E]. Despite a Philippine inquiry to Chandler regarding Spielman, no contact with the Philippine agents was made by the Americans until seventeen days later—January 27. There is no apparent reason for the lack of candor toward the inquiring NBI Director or for the delay, if the U.S. agents desired only to inform the Philippine agents of possible Philippine violations of law when introducing the informer. The U.S. agents had extracted all they could from the informant, there was nothing further (IRS) could do, as of January 10, 1962 [Ex. E]. Why, then, the seventeen-day delay in informing the Philippine agents of Spielman's story or in presenting Spielman to them? The answer is very simple: Chandler (as he later testified) did not want the Philippine agents to make searches until Washington had complied with his request to send out agents to Manila who could evaluate the result.

Because of the District Court's persistent denial of Rule 34 motions for intra-governmental communications

and plaintiff's hiding behind an invalid "classification" of secrecy [see RT 214, *et seq.*], only a limited number of Manila-Washington, and no Washington-Manila, communications were made available to appellants. There is no doubt, however, that as explosive a communication as defendants' Exhibit E, dispatched to Washington on January 10, 1962, did not remain unanswered and that Chandler was assured either by telephone or written response, during the following seventeen days, that Washington would, indeed, honor his request and assign agents to Manila to assist in the investigation. Therefore, there is equally no doubt that the January 27, 1962 meeting at the Embassy was arranged to get the Philippine NBI sufficiently interested to make the searches as soon as, but not before, such assurances were received.

The use of the word, "promised" in Chandler's testimony [NBI Director Lukban "promised" the group to make an investigation and see whether the facts told by Spielman could be corroborated] indicates that it was a U.S. request for such investigation that was made in the Embassy on January 27th. The Philippine NBI "promised" to grant such request if there was some corroboration and if approval could be obtained from their superiors. Even on February 12, 1962, Chandler could report to the Minister at the Embassy only that the Director of the NBI and the Secretary of Justice had "expressed an interest"—not yet *agreed,* but at least expressed an interest—in "exerting both U.S. and Philippine law simultaneously" [Ex. G]. Secretary Diokno's assistant's testimony in the District Court that the Secretary had briefed him on the case on February 5th and that then he only *contemplated* to help the Americans to build a tax case against Stonehill corroborates this fact, as does Del Rosario's testimony to the effect

that even then, the Secretary had instructed him to commence no action until after Diokno had returned from Hong Kong. Only after that meeting did the U.S. effort to induce the Philippine officials to make the search, meet with success.

(c) Chandler Was Not Against Raids — He Only Desired Their Postponement.

The District Court's holding that "Chandler negated any procedure which included raiding," [274 F. Supp., top of p. 422; CT 46, lines 1, 2], and that "Robert Chandler plainly expressed his disapproval of raid procedures to obtain evidence for any purpose" [CT 52, lines 24, 25; 274 F. Supp. 424, Column 2], is contrary to the evidence. At best, Chandler "did not know whether the raid was a good thing or a bad thing" [RT 285]. The true reason for his attempt to dissuade the Philippine agents from immediate raids is revealed at p. 286 of the transcript where Chandler testified:

> "The decision, as I remember, was made by Diokno.[4]
>
> "Of course, this was not a good decision from our point of view. I didn't have any agents out there to work on the case. . . . I tried to dissuade them from going ahead . . . at an early date until we had somebody out to see what the things were all about . . ."

Or, on page 285:

> "Q. You didn't urge anyone to cancel the raids at any time? A. Not that I remember . . ."

In other words, all Chandler was concerned about was the timing of the raids. He did not want the Phil-

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[4]Not by Director Lukban, as the District Court stated in its opinion.

ippine authorities to "rush into" the raids [RT 190, line 17]. At least, "[he] wanted an agent out who could evaluate the case and let him handle it at that time" [RT 190, line 24].

Even on cross-examination, by Government Counsel, Chandler answered the question, "Did you try to dissuade him from ever conducting a raid?", in the negative, and again he added that he was mainly concerned to have a special agent out there to know what effect all this would have on the IRS case [RT 986].

A fair reading of all this evidence leaves only one conclusion: After Chandler and Hawley had induced the Philippine agents to make the investigation and to authorize raids and searches, the only opposition to such searches was one of timing, *i.e.,* not to rush into the raids until the U.S. could have experienced special agents out there who could make sure that the searches would not have the adverse effect on the case that they did have *i.e.,* that they would not be illegal. There is absolutely no logic in the District Court's holding that Chandler was against raids as such because there was no sense in his asking for two additional agents to be sent to the Philippines if all they had to examine were the hundred documents that Spielman had given him which Chandler knew were insufficient and not very good evidence. He desired searches, he asked for searches he got searches. His "dissuasion" centered only on Diokno not 'rushing" these searches.

(d) Diokno's Hong Kong Meeting With the U.S. Department of Justice.

The District Court completely disregarded and in its opinion did not mention Secretary Diokno's special trip to Hong Kong to meet Attorney General Kennedy and Exhibit AZ, the top secret report of this meeting.

The subject of a Kennedy meeting came up as early as February 1st when Chandler first told Secretary Diokno at the Columbian Club that he needed evidence in order to proceed with a U. S. tax case against appellant Stonehill [RT 158-159]. This was tantamount to a request for assistance. This meeting with Kennedy was demanded by Diokno before he was going to "stick his neck out and authorize action against (appellants)" [RT 161-162]. He desired to ask Kennedy for simultaneous action in the U. S. and to assure the presence of U. S. experts to evaluate the results of the searches [Ex. A-Z]. Diokno met Kennedy's Executive Assistant since the Attorney General's schedule did not permit a personal conference. He promised Kennedy's assistant that he would take action against appellants *"outside Philippine government channels."* (Emphasis added.) Upon his return on February 13, Diokno authorized the searches to be made on February 24th [RT 164].

This entire sequence of events and the very important Exhibit A-Z was completely disregarded in the Court's opinion.

(e) Planning and Preparation of the Searches at Chandler's Home.

The District Court did find as a fact that the "modus operandi" of the searches was discussed at Chandler's home. Chandler himself testified that the locations to be raided were the main subject of the pre-raid meetings [RT 149], and that "specific locations of documents and records in the premises to be searched were the subject of discussion" [RT 278-280].

Secretary Diokno himself came to Chandler's house to discuss the seizure of appellants' records [RT 197-199] and Chandler's home apparently became the headquarters for the entire raid planning because the NBI,

which was tapping appellants' phones, brought current recordings to the house, which were then played and listened to by everyone, including Chandler [RT 149-150].

(f) The U.S. Agents' Active and Physical Participation in the Raids.

The Court is respectfully urged to examine Exhibits I and J. Chandler freely admitted that Ex. J was written by him. Exhibit I is headed, "U.S. Tobacco Company —Picture Folder." He admitted that he "had a vague recollection of seeing some pictures the NBI took" [RT 341] and that the words, "Comments on USTC Picture Folder" might well have been written by him while looking at such a picture folder [RT 1076], Major Del Rosario testified that he had seen an NBI picture folder and that the photographs had been made by the NBI prior to the raids [RT 862, 866-867].

Exhibit I has only one grammatical and logical interpretation: they were instructions added by Chandler to the NBI picture folder, telling the agents what to seize, *e.g.,* "confiscate records in separate small adjoining building." Asked specifically with regard to this exhibit, Chandler stated:

> "Q. And you did this to help with the raids? Is that correct? A. I presumed that it would probably be used in the raids, yes." [RT 366].

Exhibit J, sketches of two buildings used by Stonehill companies, includes four instructions to raiders: "Check cigarette cases for stamps; check dummy wall for door; rolls of paper to be checked," etc.—all in Chandler's handwriting. Testimony by two witnesses who were present during the raids, Farb [RT 748-749] and Miss Zubiri [RT 639-642, 643, 644, 645], brought out that the raiders closely followed Chandler's instructions, as given on Exhibits I and J—another fact that was completely disregarded by the District Court.

(g) Chandler's Visit to NBI Director Lukban's Home the the Night Before the Raids.

The District Court mentioned that just prior to the raid, a copy of one of the search warrants was shown to Chandler and that he stated that the language appeared to be "all right" [274 F. Supp. at 422; CT 46, line 32; CT 47, line 1].

This finding hardly does justice to the circumstances under which Chandler approved the language of the search warrants. According to his own testimony, he was brought by Assistant NBI Director Nocon late in the evening of March 2 and followed Nocon to NBI Director Lukban's house [RT 300]. He was introduced to the team leaders who were going to take charge of individual groups of raiders, then assembled in the basement [RT 303-304]. Colonel Lukban asked him to look at the search warrants then being typed by Lukban's assistant, Nocon [RT 311-316]. After reading one of them, which was representative of all (the search warrants were in practically identical language and all of them required the seizure of "books of accounts, financial records, vouchers, correspondence, receipts, ledgers, journals, portfolios, credit journals, and other documents and other papers showing all business transactions" [Exs. M thru Z; Exs. A thru AL], he said that they sounded "all right" to him [RT 311-312]. Small wonder: the evidence commanded to be seized of course had no significance for deportation proceedings. It was the very evidence that Chandler had told Secretary Diokno, Major Del Rosario, and Colonel Lukban was needed by him for a U. S. net worth tax case [RT 328; 847, 848, 923, 924]. The Philippine law enforcement officials did not need this type of evidence. They were not interested in any tax case against appellants [RT 848] and no Philippine Bureau of Inter-

nal Revenue agent took any part in the investigation [RT 385]. Therefore, even though Chandler did not know much about search warrants, as the District Court found, the list of items to be seized certainly sounded "all right" to him. Nocon of course did not read the warrant to Chandler to ascertain whether it was legal under Philippine law. He read it only to ascertain whether the list of documents to be seized was "all right" with Chandler. It was.

(h) Chandler's Selection of Room 304, Army-Navy Club for Search.

The District Court Found that it was Chandler who placed the Army-Navy Club[5] on the list of locations to be searched. The District Court failed to observe that this room was the location where appellant Stonehill kept most of his confidential and personal papers [RT 679-680], and that Chandler himself had checked the location prior to the raid and was solely responsible for it having been found and searched [RT 346]. The trial Judge stated during the hearing that he considered this selection of a search target an act of "participation" in the raids [RT 1196]. In his opinion, however, he failed to do so, without reason. *The documents and records seized at the Army-Navy Club at Chandler's request were subsequently turned over to U.S. agents!*

It is respectfully submitted that the personal selection of an important location for a raid is a clear act of instigation and participation, and is absolutely equivalent to, and indistinguishable from, the Customs agents' selection of the package of watches in *Corngold,* and his request to the TWA agent to open the package. In

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[5]Not the Army-Navy "Building," as erroneously described in the Court's opinion, 274 F. Supp. at 422; CT 46, line 16.

Corngold, the package picked out by the U.S. Agent was opened and searched. In *Stonehill*, the room picked out by the U.S. agent was opened and searched. In both cases, the evidence resulting from that search must be suppressed.

(i) Supervision of the Raids by Chandler, Physical Presence and Participation by U.S. Agents in the Searches and Seizures.

Armed with pencils and analysis paper to copy records, U.S. agents Chandler, Reynolds and Ragland stationed themselves at the Arson Squad Building of the NBI on Saturday, March 3, 1962, in accordance with a pre-arrangement with NBI Director Lukban [RT 280, 281, 282, 287].

Thereafter, Chandler observed the progress of the raid of a private office rented by Stonehill which was located in the former Cuban Embassy [RT 393, 394]. Thereafter, he drove to various other places where raids were in progress [RT 400]. Finally, as the District Court found, the agents were called to the NBI Director's office at about 10:00 P.M. on that day [RT 1170].

But the District Court completely disregarded the imporant fact that right after the visit with Colonel Lukban, Chandler, Reynolds and Ragland, in their U.S. Jeep, went to a Stonehill company warehouse, after being told by Director Lukban that "there were tremendous quantities of records there." When they arrived, the raids were in full swing and a number of NBI agents were there searching. According to Chandler's own testimony, all three U.S. agents went into a walled-off section of the area raided, examined records there located, and put in cardboard cartons "whatever they

thought was important" [RT 406]; important to the U.S.!

> "Mr. Lukban then approached us and stated that a large quantity of records had been seized in a warehouse, U.S. Tobacco Company warehouse, and his personnel were primarily lawyers and were not trained in accounting, did not recognize accounting records, and wondered if we could help identify the more important information in those records." [Tr. 1142].
>
> * * *
>
> "Yes. We agreed to go with the agent and identify the more important accounting records." [Tr. 1143].
>
> * * *

Both Chandler and Ragland testified that Chandler made a general survey and search of the warehouse [RT 304, 305; 1145], while Ragland confirmed that "all of them examined the records and picked out the more important ones" [RT 1145].

Thereafter, the three U.S. agents went to the main office of the U.S. Tobacco Co., because (as Chandler testified) he thought "that the NBI's execution of the raids was handled in a rather disorganized manner" [RT 414]. There, Chandler met the team leader in charge [RT 413-414], was invited to enter the building and inquired whether the NBI had found certain records stored behind the main office of the U.S. Tobacco Co. [RT 414-415]. Unable to explain to the team leader the exact location, Chandler went into the building and physically pointed it out to him [RT 415].

The District Court completely disregarded this evidence of physical, actual participation by the U.S. agents

in the raids of March 3, 1962. There is no conflict of evidence, as to these acts of physical participation. The U.S. agents themselves testified to them. The District Court's disregard of this evidence is clearly erroneous.

It is respectfully submitted that on this overwhelming and one-sided evidence, the District Court's conclusion of law that there was no instigation or participation by the U.S., is untenable and must be reversed.

The U.S. District Court for the Southern District of New York in *United States v. Stonehill*, 254 F. Supp. 1004 (the criminal case), subsequently dismissed, ordered a hearing to determine whether Chandler's and other government agents' participation in the searches made these searches, in effect, Federal searches, although conducted outside the United States. As authority for its order, the District Court cited *Byars v. U.S.*, 273 U.S. 328, 47 S. Ct. 248, 71 L. Ed. 520 (1927), and *Lustig v. U.S.*, 338 U.S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949).

The above cited New York *Stonehill* decision, made on April 27, 1966, of course preceded this Court's *en banc* decision in *Corngold* of September 29, 1966, and therefore used the pre-*Elkins* parallels of Federal participation in *state* searches as authority for ordering the hearing.

To show most dramatically the parallelism of the instant case with *Byars* and *Lustig*, we respectfully call the attention of the Court to the attached comparison of the facts in *Stonehill* with those in *Lustig* and *Byars* (Appendices B and C). This comparison is particularly persuasive because this Court's opinion in *Corngold*, as was the New York Court's opinion in *Stonehill*, is primarily based on the authority and participation standards of *Byars and Lustig* (367 F. 2d at p. 6).

The *quantum* of Federal involvement or participation in a State search required to make such search in substance a Federal search has been the subject of several Supreme Court and Circuit Court decisions. The first was Byars which held:

> "While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods."
>
> *Byars v. U.S.*, 273 U.S. 28 (1927), at p. 32.

Anything but "mere" or "bare" unofficial presence of a Federal officer at a State search was held by Byars to amount to such participation as to make the search a Federal search provided that the search produced evidence in which he, the Federal officer, had an official interest in the results. 273 U.S. at page 32.

The Federal agents in *Stonehill* were present throughout in an official capacity. They had arranged beforehand to obtain the results of the illegal searches.

The three cases cited by the Supreme Court in *Byars* as authority for suppression, *Flagg v. U.S.*, 233 Fed. 481 (C.A. 2, 1916), *United States v. Falloco*, 277 Fed. 75 (DC WD Mo., 1922), and *Legman v. U.S.*, 295 Fed. 474 (C.A. 3, 1924) involved no physical presence of the Federal officer at the State search and turned either on pre-search cooperation or post-search turning over of evidence.

In *Gambino v. U.S.*, 48 S. Ct. 137, 275 U.S. 310 (1927) there also was no Federal physical presence at the search. Evidence was suppressed because the State officers were in fact enforcing a Federal law and were seizing evidence to turn over to Federal prohibition officers. In the *Stonehill* case, the Philippine officers were

in fact enforcing U. S. tax laws and seized evidence to turn over to the U. S. officers for this purpose.

Finally, in *Lustig v. U.S.,* the Federal officer, seeing no evidence of a Federal crime, caused a municipal officer to make an illegal search while waiting at police headquarters to see what the search would turn up. Only after the search was completed did the Federal officer, together with the city officer, gather up some of the evidence which was later turned over to him. On these facts, the Supreme Court declared this was, in substance, a Federal search, and interpreting *Byars v. U.S., supra,* said, "The crux of [the Byars] doctrine is that a search is a search by a Federal official if he had a hand in it . . ."

The Federal officers in *Stonehill* certainly "had a hand" in the searches and seizures; actually, as shown in Appendix C, the facts relating to involvement of the Federal officers in the search of *Stonehill* are not only parallel to the acts of participation in *Lustig* but substantially exceeded in number and gravity those which the Supreme Court considered sufficient to make the *Lustig* search a Federal search.

The parallelism of *Stonehill* with *Corngold, Byars* and *Lustig* is so compelling that further argument appears unnecessary. For the sake of completeness, appellants now turn to *Birdsell v. U.S.,* 346 F. 2d 775 (1965), also a Mexican search case which was cited by this Court in *Brulay.*

There are four main points of distinction between *Birdsell* and *Stonehill:* First, the *Birdsell* record "supported a finding that Birdsell was not arrested until after the search and that he consented to the search" (346 F. 2d at 782); there certainly was no consent in *Stonehill.* Second, the search in *Birdsell* "might well meet Fourth Amendment standards;" in *Stonehill,* the

Court found it did not. Third, in *Birdsell,* the issue was not raised by a pre-trial motion as required, 346 F. 2d at 782; here, it was. Fourth, in *Birdsell* there was no showing that under the Mexican law or constitution or under any statutes or rules equivalent to the Fourth Amendment, the arrest and searches were unlawful. In *Stonehill,* the Philippine constitution and laws are patterned after the U.S. Constitution and laws and the searches were held to have been illegal under both the Philippine and U.S. Constitution.

In *Birdsell,* in footnote 10 on page 782, the Court specifically held:

> "We do not mean to say that in a case where federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory powers over the administration of federal justice, might not refuse to allow the prosecution to enjoy the fruits of such action."

But the Court in *Birdsell* specifically found that the evidence there was a "far cry" from shocking the conscience.

It is respectfully submitted that in the instant case the evidence indeed was such that it must shock the conscience of a Federal Court. This Court therefore should refuse to allow the plaintiff to enjoy the fruits of the actions of its agents. To permit the evidence to be used would be equivalent to acquitting the instigator, planner and participator in a murder because he did not pull the trigger. Affirmance of the District Court would, in fact, *invite* violation of constitutional rights by subterfuge, and be contrary to this Court's holdings in *Taglavore v. U.S.,* 291 F. 2d 262, 266 (CA 9 1961), *State of Montana v. Tomich,* 332 F. 2d 987, 989 (CA 9 1964), and *Lenske v. United States,* 383 F. 2d 20 (CA 9 1967).

In the instant case, the resort of the federal agents to "subterfuge and evasion" sought to be deterred by *Elkins* and their unconstitutional conduct—all shocking to the conscience of any federal court,—were exposed. U.S. federal agents who now, in one form or another, exercise jurisdiction over American citizens all over the world must be deterred by this Court from violating the constitutional rights of American citizens through the surreptitious use of foreign police, who are dependent on U.S. aid for training and cooperation. The Constitution and the cases cited herein so require.

VI.
CONCLUSION.

For the reasons above stated, it is respectfully submitted that the District Court's order should be reversed, with directions to suppress all evidence directly or indirectly resulting from the searches of March, 1962.

TRAMMELL, RAND & NATHAN and
BERTRAM H. ROSS,
By BERTRAM H. ROSS,
Attorneys for Appellants.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

BERTRAM H. ROSS

APPENDIX A.

Index of Exhibits.
(Rule 18(f)).

Defendant's Exhibits	For Identification	In Evidence
A	87	96
B	113	117
C	117	—
D	133	447
(remarked Plaintiff's Exhibit 11)	975	977
E	236	296
F	241	463
G	257	259
H	344	—
I	349	352
I(a)	1081	1083
J	360	364
J(b)	1081	1083
JA	365	1070
K	418	—
L	419	—
M	482	529
N	489	529
O	490	529
P	491	529
Q	492	529
R	493	529
S	495	529
T	495	529
U	496	529
V	496	529
W	498	529
X	499	529

Defendant's Exhibits	For Identification	In Evidence
Y	500	529
Z	500	529
AA	501	529
AB	502	529
AC	502	529
AD	504	529
AE	505	529
AF	508	529
AG	508	529
AH	509	529
AI	509	529
AJ	509	529
AK	510	529
AL	510	529
AM	514	515
AN	530	537
AO	537	539
AP	578	583
AQ	578	583
AR	726	727
AS	736	738
AT	759	764
AU	761	766
AV	765	—
AW	932	938
AY	938	951
AZ	977	1216
BA	1058	—
BB	1168	1169

Master Index.

Plaintiff's Exhibits	For Identification	In Evidence
1	454	457
2	454	—
3	562	—
4	584	586
5	623	—
6	715	—
7	724	725
8	797	798
9	—	799
10	—	815
11	—	977
12	—	1201

APPENDIX B.

Comparison of Facts in Byars v. U.S. With Facts in the Instant Case.

BYARS	STONEHILL
"The facts attending the search are in substance these:	In *Stonehill,* some of the warrants had been prepared by Danny Nocon when Federal Agent Chandler entered NBI Director Lukban's house during final preparations for the raids [RT 305-306; 311-316]. The warrants were read to Chandler who approved the language [RT 311-312]. Chandler requested that a warrant issue for 304 Army-Navy [RT 1008-1011], and his request was honored. All warrants called for evidence Chandler had requested. [Exs. M thru Z; AA thru AL], Chandler having told the NBI previously what he desired [RT 328; 847-848; 923-924].
The warrant had already been issued upon application of the police department, as heretofore stated, and the officer in charge of the night liquor bureau of the police station was perfecting his arrangements for the search, when one R. C. Adams, federal prohibition agent at Des Moines, entered the station."	
* * * * *	* * * * *
"Adams had no previous knowledge of the warrant nor of the contemplated raid, and had had no conversation or understanding	Chandler knew of the raids and even their specific date and hour, long ahead of time [Ex. AZ; RT 271-399]. He had con-

with the police officers concerning the enterprise."

* * * * *

"The officer in charge, finding his force insufficient, impressed Adams into service. To the question 'Where are you going?' the officer replied, 'Take your car and follow me.' Upon arriving at the premises to be searched the men in the raiding squad were assigned to different rooms."

* * * * *

"Adams searched the kitchen; he there found the stamps charged in the first count of the indictment."

* * * * *

stant conversations and arrived at an understanding with the police officers during the 12 to 15 meetings at Chandler's home [RT 273], at the Department of Justice, NBI Hqs. and elsewhere [RT 847-848]. He had a prior understanding with Lukban that the seized records would be made available to him for inspection and copying [RT 989; 1004-1005].

According to Chandler, Director Lukban requested him to take his car and follow another agent to the warehouse in the Port Area in Manila, where there were tremendous quantities of records; to sort these records and to see what ought to be brought back to NBI Hqs. [RT 402 thru 417]. The raids were still in progress when Chandler did so [*Ibid.*].

* * * * *

Chandler and Ragland searched the Goodyear warehouse and found their financial records of U. S. Tobacco Corporation in

"Those covered by the second count were found by the state officers in another room. All were subsequently turned over to the government."

which Stonehill had an interest. Whatever they thought was important they put in a cardboard carton [RT 406].

* * * * *

Other records involved in another part of this case were seized by NBI officers in different locations, including the Army-Navy Club specifically selected by Chandler. All records sought to be suppressed were subsequently turned over to the Federal agents [RT 1153, 1154, 1159, 1160].

* * * * *

APPENDIX C.

Comparison of Facts in Lustig v. U.S. With Facts in the Instant Case.

LUSTIG	STONEHILL
"At about 2 p.m. on Sunday, March 10, 1946, Secret Service Agent Greene received two telephone calls, one from the police of Camden, New Jersey, the other from the manager of a hotel in that city, indicating violations of the counterfeiting statutes being carried on in Room 402 of the hotel."	On Monday, December 18, 1961, FBI Agent Hawley introduced Spielman to IRS Agent Chandler, because Spielman had information that might be helpful to a U.S. Tax case [RT 97-99].
* * * * *	* * * * *
"On looking through the keyhole of the suspect room after reaching the hotel, Greene saw Lustig, two brief cases and a large suitcase, but no evidence pertinent to counterfeiting. He questioned the chambermaid whose suspicions had led to this investigation. She recounted the hearing of noises 'like glass hitting against glass or metal hitting against metal' emanating from the suspect room. She also remarked that she had seen what looked like money on the table."	Chandler looked at documents Spielman had given Hawley [RT 134-135] and interviewed Spielman daily, either in Chandler's office or at Chandler's house [RT 112-113; 122].
* * * * *	* * * * *

"Greene thereupon reported to Detective Arthur of the Camden police at the Camden Police Station that he had seen no evidence of counterfeiting but was confident that 'something was going on.'"

* * * * *

"Arthur reported the affair by telephone to his superior, Captain Koerner, at his home, who then came to the police station."

* * * * *

"In his account of the affair Greene gave to Koerner the names under which the occupants of the room had registered."

* * * * *

The "Lustig" police proceeded without help or instructions to prepare for the raids.

No pre-raid Federal-State cooperation or agreements.

* * * * *

Having obtained all the information Spielman had by January 10, the Federal Agents realized they hadn't any "really good evidence," and sometime thereafter Hawley called Director Lukban of the Philippine NBI and arranged for a meeting on January 27 [RT 139], during which meeting Lukban was told what "was going on." [RT 140].

* * * * *

Lukban reported the affair to his superior, Secretary Diokno [RT 151].

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Chandler and Hawley met Diokno, and in their account of the affair, gave Diokno the information they had, stating however, that evidence had to be developed [RT 159].

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Now, "Stonehill" differs from "Lustig." In Stonehill, Chandler helped with the detailed planning in many meetings at his home [RT 273-274] or at the Philippine Government of-

"At about four o'clock in the afternoon of the afternoon of the same day Koerner [the captain] and three detectives secured a key from the manager of the hotel and entered Room 402. The police officers proceeded to empty the bags and the drawers of a bureau and thus came upon the evidence sought to be suppressed. What they found indicated counterfeiting of currency rather than of racetrack tickets."

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"During all this time, Greene had remained at police headquarters because he 'was curious to see what they would find.'"

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fices [RT 847-848]. He pointed out what evidence he needed [RT 847-848] and gave written instructions as to what to seize [Exs. I and J].

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At Chandler's insistence Philippine raiders searched Room 304 of the Army-Navy Club [RT 346] in addition to other locations previously agreed upon during the meetings at Chandler's house [RT 121, 149] and approved by him, when Danny Nocon went over the 24 locations selected with Chandler at Colonel Lukban's house the morning of the raid [RT 1008-1011].

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During the raids, Chandler, Ragland and Reynolds were either in the NBI headquarters complex at the place assigned to them by Lukban [RT 377-378, 400] or drove to the raid locations to observe their progress [RT 394] "out of curiosity." [RT 413].

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"On finding what they did find, Koerner sent word to Greene, who came to the hotel and examined the evidence in controversy."

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"After the search was completed, Greene *and the city police* gathered up the articles revealed by the search and carried them to the police station. *Some* of these articles were given to Greene before he left Room 402; *all* were *eventually* turned over to him."

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"We therefore accept as a fact that Greene did not request the search, that, beyond indicating to the local police that there was something wrong, he was not the moving force of

At 10:00 p.m., Lukban sent word to Chandler, who came to NBI headquarters, then went to the Goodyear warehouse, selected and examined accounting records there while the raid was still in progress, went on to other raid locations and later again to the NBI building and examined the evidence in controversy [RT 1170; 402, 403, 406; 416, 417; 646-650; 412-415; 417, 418, 423, 426, 1037].

* * * * *

The Internal Revenue Service agents *and the NBI* gathered up the articles revealed by the search. The NBI carried them to headquarters. *All* the evidence sought to be suppressed was eventually turned over to United States agents [RT 406; 1037; 1159-1160].

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In *Stonehill,* the case of participation is much stronger on this particular point because we cannot accept the Government's contention that Chandler "did not request the

the search, and that the search was not undertaken by the police to help enforcement of a federal law."

* * * * *

"It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with the view to its use in a federal prosecution, or the federal agent himself takes articles out of a bag. It would trivialize law to base legal significance on such a differentiation."

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"Had Greene accompanied the city police to the hotel, his participation could not be open to question even though the door of Room 402 had not been opened by him."

* * * * *

"To differentiate between participation from

search." On the contrary: he was the moving force and the search was undertaken by Diokno, "outside of ordinary Government channels" [Ex. AZ] to help enforcement of a U.S. Federal law.

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It surely can make no difference whether the NBI officer turned up the evidence and handed it over to the Federal agents for their critical inspection with the view to its use in the federal tax case, or the Federal agents themselves took the articles from Room 304, Army-Navy Club or the former Cuban Embassy. It would trivialize law to base legal significance on such a differentiation.

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Had Chandler accompanied the NBI to the Army-Navy Club, his participation could not be open to question even though the door of Room 304 had not been opened by him.

* * * * *

Chandler certainly participated in the illegal

the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment as interpreted in Byars v. United States, supra, 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520.

"The crux of that doctrine is that a search is a search by a federal official if he had a hand in it."

* * * * *

search from the beginning, even its conception. He joined it physically before it had run its course and he and other United States personnel "had a hand in it."

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